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CT 55

V. 2428
No. 11029

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

LA SOCIETE FRANCAISE DE BIENFA-
ISANCE MUTUELLE, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

AUG 14 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern Division

22967-S

LA SOCIETE FRANCAISE DE BIENFAIS-
ANCE MUTUELLE, a corporation,
Plaintiff

vs.

UNITED STATE OF AMERICA,
Defendant

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is now, and ever since June 7, 1856, has been a corporation incorporated pursuant to and in accordance with Chapter VIII (relating to "Religious and other Associations or Societies") of the California Corporation Act of 1850. Its residence, office and principal place of business are in the City and County of San Francisco, State and Northern District of California. It was incorporated as the successor of, to take charge of the estate and property belonging to, and to transact all affairs relative to the temporalities of, and unincorporated beneficial society of the same name founded in San Francisco December 28, 1851, for the purpose of caring for and treating the sick without profit.

II.

Plaintiff's sole purpose ever since its incorporation [1*] has been, and now is, the care and treatment of the sick without profit. To that end it has always maintained, and now maintains, a non-profit hospital. It is now, and ever since August 14, 1935 has been, a charitable corporation within the meaning of Section 811 (b) (8) of Title VIII and of Section 907 (c) (7) of Title IX of the Social Security Act and of the corresponding provisions of the Federal Internal Revenue Code.

III.

Plaintiff has not now, and has never had, any capital stock. No dividends, interest, sick or death benefits, or other pecuniary benefits or distributions are now, or have ever been, paid to any one. No part of its net earnings enures, or ever has enured, to the benefit of any private shareholder or individual.

IV.

Plaintiff's affairs are now, and for many years prior to August 14, 1935, have been managed by a board of fifteen directors, elected annually by the members, and who serve without any fee, salary, or other compensation whatever.

V.

Plaintiff has been able to acquire and enlarge its present hospital plant and facilities mainly through testamentary and other gifts and the in-

*Page numbering appearing at foot of page of original certified Transcript of Record.

come therefrom. Receipts from members would not have been sufficient therefor. The assets acquired by plaintiff in 1856 from its predecessor had largely consisted of charitable gifts and donations. Since 1851, gift, legacies and devices have aggregated approximately Three hundred and fifty-seven thousand three hundred and twenty-two and 56/100 (357,322.56) dollars. In the absence thereof, plaintiff could not have acquired, improved or enlarged its present plant nor afford the facilities which it now furnishes. There now is carried on plaintiff's books a reserve amounting to Two hundred and [2] fourteen thousand seven hundred and seventy-seven and 36/100 (214,777.36) dollars, of which Seventy-six thousand seven hundred and eighty-three and 87/100 (76,783.87) dollars is made up of such gifts. By its By-Laws, such reserve is set aside for the improvement, enlargement, and betterment of its plant and facilities. Said Chapter VIII of said Corporation Act of 1850 authorizes it to take and hold property, real and personal, by gift or device, and to take, hold and improve real and personal property and to erect hospitals and other buildings.

VI.

Prior to 1895, plaintiff owned and operated a general hospital in said City and County of San Francisco. In and after 1894 it erected, and has since owned and operated, a general hospital (now comprising eleven buildings) on its block of land in San Francisco bounded by Geary Boulevard, Anza Street and Fifth and Sixth Avenues. It has a

capacity of 225 beds, (seventy-six in private rooms and one hundred forty-nine in wards), and a nursery with fifteen cribs, and is open to the public at large without distinction as to race, creed or color. Said hospital is now, and long has been approved by American Medical Association and American College of Surgeons as a "Class A" Hospital. Its equipment, services and facilities are adapted and available for the treatment of every kind of human sickness. In plaintiff's fiscal year ending February 28, 1943, the average daily number of hospitalized patients was 137.45. The number of patient-days, viz: the total number of days' treatment given to all hospitalized patients, was 63,315. In said year, there were 30,065 consultations by members at, or calls on members by the medical staff outside, the hospital. [3]

VII.

Plaintiff maintains, in connection with said hospital, and ever since 1895, has maintained, at about an average annual cost of about \$12,000 a Training School for nurses for the care of the sick, injured and infirm. It was the first such School organized on the Pacific Coast. It is approved and accredited by the Board of Nurse Examiners of the State of California. There is now, and ever since 1923 has been, situate on said block of land a large four story and basement brick building built and used exclusively as a training home for nurses and devoted wholly to their education, training, lodging and maintenance, when they take a three-year course in connection with the hospital. In addi-

tion, in the main hospital building, there are two fully equipped class rooms for said student nurses and a dietetic school room. There are usually sixty to seventy student nurses enrolled and following the course of study.

VIII.

Said hospital is accredited by American Medical Association for the training of interns, and as such, a scientific and teaching institution for the future physicians. There are usually not less than six interns in said hospital, each of whom is a graduate of an accredited Medical School and takes, at said Hospital, a one-year course in order to obtain a wide field of experience, and where they are directed and trained under the supervision of the medical staff.

IX.

Plaintiff, in said hospital, also maintains, from current income, an Old Peoples Home for the care of aged and feeble members, with a capacity of fifteen beds at all times fully occupied. To said Home there are admitted, for benevolent purposes only, and subject to the discretion of the Board of Directors, (a) members over sixty-five years [4] of age, who pay for their admission thereto a sum of money determined by said Board according to the circumstances of each case, but which sum is not based upon any fixed schedule of rates or upon any profit-making basis, but upon the applicant's needs and ability (if any) to pay and upon social and humane considerations and is not designated

to yield a profit, and (b) members who have been such for at least thirty consecutive years and who are past sixty-five years of age and who, though not ill, are unable, on account of old age or physical disability, to earn a living, no charge being made for their admission.

X.

Plaintiff affords other charitable relief. (a) It provides, at its hospital, two permanent free beds for the treatment of indigent persons under the patronage of La Societe de Secours des Dames Francaises, (French Ladies Relief Society), an independent charitable corporation in San Francisco. (b) It is an agency of the Community Chest of San Francisco, from which it receives about \$1,500 per annum to compensate it for the actual expense to it of service rendered to patients sent it by the Chest, but which service is not intended to, and does not, yield plaintiff any profit. (c) It maintains, at said hospital, a Social Service Department for investigation and follow-up work in Community Chest cases and in other cases referred to or applying to it. (d) It is situated on one of the main traffic thoroughfares of San Francisco, and gives free emergency treatment if necessary, (an average of about 300 annually), to all *deserv*-cases in its neighborhood.

XI.

The number of plaintiff's members is now, and always has been, without limit. It has always admitted, and now admits, new members. Its present membership is 9,645 and at the date of the

various payments hereinafter referred to, its [5] members is averaged about 9,800. It does not solicit, and never has solicited, new members, and has never paid any commission or compensation to any one to obtain new members. It has only one class of members, who pay monthly dues of \$1.75, except (a) life members who pay upon their admission, but whose rights are otherwise the same, and (b) children under fifteen years, one of whose parents is a member, pay one dollar per month.

XII.

Continued payment of members' dues is not, however, necessarily a condition to relief. In the case of indigent member-widows, and of other needy members, such dues, at the discretion of the Board of Directors, are paid from plaintiff's relief fund originally set up in 1905 for that purpose, and since added to. In the Board's discretion, other indigent members are cared for in illness without charge, and are furnished private rooms and other needed facilities. A member under seventeen years of age, if orphaned or abandoned by his parents, pays no dues, nor do student nurses who are members.

XIII.

Members are entitled to the following benefits, either without any charge or at a discount from prevailing prices, viz:

1. Medical and surgical care and consultations are given without charge, to plaintiff's members by staff of physicians specially appointed therefor,

who give consultations either at, or outside of, said hospital;

2. Hospitalization is given, without charge, including operating room service, drugs, dressings, Board and Room, up to and not to exceed six months in any one year, (but in *tuberculosic* cases the time of hospitalization is unlimited), except for a charge of fifty cents per day when hospitalized in a ward, and of about fifty per cent of prevailing prices [6] when hospitalized in private room;

3. Special discounts (from ten to ninety per cent of prevailing prices) on drugs and dressings, and on all X-Ray examinations and treatments, on Diathermy, Hydrotherapy, Physiotherapy treatments, Metabolism examinations, electrocardiograms, and in obstetrical cases.

XIV.

The annual expense of the operation and maintenance of the hospital including the cost of medical, surgical and clinical services to hospitalized and nonhospitalized members, general administrative expense, and the periodical modernization and improvement thereof and of its equipment, is derived from (1) members' monthly dues; (2) admission fees of new members of \$25 and upwards, according to age; (3) income from plaintiff's securities and other investments; (4) donations, legacies and bequests, (5) life membership fees; (6) special admission fees from life boarders; (7) receipts from non-member hospitalized patients, and (8) *an* annual contributions from the Community Chest of San Francisco.

XV.

Whenever, in any year, the funds so received are in excess of the amount of such expenses, such excess is credited to a surplus accumulated in furtherance of the accomplishment of the plaintiff's non-profit purpose. The net deficiency, if any, in any year is paid out of such surplus.

XVI.

Ever since January 1, 1936, and for many years continuously prior thereto, there has been no change in plaintiff's said plan and method of operating said hospital. On July 14, 1937, Charles T. Russell, as Deputy United States Commissioner of Internal Revenue, officially notified plaintiff [7] in writing, that it was "exempt from payment of the taxes imposed by the Social Security Act, approved August 14, 1935, inasmuch as you come within the exceptions provided in Section 811 (b) (8) of Title VIII and Section 907 (c) (7) of Title IX," and, further, that it was "entitled to exemption under the provisions of Section 101 (6) of the Revenue Act of 1936."

XVII.

On February 24, 1939, the then acting United States Commissioner of Internal Revenue officially notified plaintiff, in writing, that "it appears you are not operated for profit and do engage in substantial charitable activities", but that it was not entitled to exemption from income tax under the provision of Section 101(6) of the Revenue Act of 1938 as a corporation organized and operated ex-

clusively for charitable purposes, and that "the ruling contained in Bureau letter of July 14, 1937 is modified accordingly." Said communication further stated that "the status of your organization for Social Security Tax purposes will be made the subject of a separate communication." Thereafter, on April 3, 1939, Victor H. Self, as the acting Deputy Commissioner of Internal Revenue, officially notified plaintiff, in writing, referring to said communication of February 24, 1939, and stating that plaintiff was not entitled to exemption under Sections 811(b)(8) of Title VIII, and Section 907(c)(7) of Title IX, of said Social Security Act.

XVIII.

After the receipt of said communication of July 14, 1937, plaintiff refunded to its employees all the contributions which it had theretofore deducted from their wages pursuant to said Act, and thereafter discontinued such deductions until said communication of April 3, 1939. The taxes payable pursuant to said Act for the period between [8] January 1, 1937, and March 31, 1939, including the tax upon employees' wages, with the penalties and interest thereon, were paid by plaintiff entirely from its own funds, and no part of such payments represents amounts ever deducted or withheld from the wages or income of any employees or ever repaid by any employee in whole or in part.

XIX.

Except only as to the name of the person by whom the same were collected, plaintiff, on the respective dates hereinafter set forth, paid to, and there was collected by, Clifford C. Anglim, as Collector of Internal Revenue for the First District of California, the following amounts for taxes assessed upon it in alleged conformity with said Social Security Act, with interest thereon and the penalties in respect thereof, payment of all whereof had been demanded of it by said Collector;

(a) Taxes assessed and collected allegedly pursuant to Title IX of the Social Security Act, (Sections 1600 and following of Internal Revenue Code), with penalties and interest thereon:

For calendar year 1936:

Tax	\$462.12	
Penalty	115.53	
Interest	95.70	
		<u>\$673.35</u>

Said payments were all made August 10, 1940.

For calendar year 1937:

Tax	\$944.36	
Penalty	236.09	
Interest	139.01	
		<u>\$1,319.46</u>

Said payments were all made August 10, 1940.

For calendar year 1938:

Tax (in part)	\$1,484.32	
Penalty	371.09	
Interest	129.58	
		<u>\$1,984.99</u>

Said payments were all made August 10, 1940. [9]

For calendar year 1939:

Tax (in part)	\$1,424.61	
Penalty	253.50	
Interest	39.84	
		\$1,717.95

Said payments were all made August 10, 1940.

For calendar year 1940:

Tax—\$812.65 paid January 16, 1941.

For calendar year 1941:

Tax—\$805.66 paid January 27, 1942:

(b) Taxes, penalty and interest assessed and collected allegedly pursuant to Title VIII of the Social Security Act, (Sections 1400 and following of Internal Revenue Code).

For calendar year 1937:

Tax	\$5,229.96	
Penalty	1,307.49	
Interest	990.36	
		\$7,527.81

Said payments were all made October 26, 1940. Of said sum of \$5,229.96, one half, or \$2,614.98, represented employees' contributions paid by plaintiff from its own funds.

For calendar year 1938:

Tax	\$5,750.92	
Penalty	1,437.74	
Interest	664.44	
		\$7,853.10

Said payments were all made August 10, 1940. Of said sum of \$5,750.92, one half, or \$2,875.46, represented employees' contributions paid by plaintiff from its own funds.

For calendar year 1939:

Tax	\$ 17.59	paid July 15, 1939
Tax	21.95	paid Oct. 18, 1939
Tax	19.65	paid Jan. 19, 1940
Tax	3,500.11	
Penalty	1,262.31	
Interest	279.47	
	<hr/>	\$5,091.08

Said last three amounts were paid August 10, 1940. Of said sum of \$3,500.11, \$705.33 represented employees' contributions paid by plaintiff from its own funds. [10]

For calendar year 1940:

Tax (first quarter)	\$677.32	
Penalty	12.30	
Interest	16.92	
	<hr/>	\$706.54

Said sums were paid August 10, 1940.

Tax (second quarter)	\$683.50	paid Aug. 10, 1940
Interest thereon	3.42	paid Sept. 6, 1940
	<hr/>	\$686.92

Tax	\$664.62	paid Oct. 17, 1940
Tax	583.24	paid Jan. 16, 1941

For calendar year 1941:

Tax	\$670.34	paid April 15, 1941
Tax	673.47	paid July 5, 1941
Tax	661.21	paid Oct. 13, 1941
Tax	680.50	paid Jan. 12, 1942
	<hr/>	\$2,685.52

For calendar year 1942:

Tax	\$ 710.76	paid April 15, 1942
Tax	716.40	paid July 15, 1942
Tax	719.80	paid October 9, 1942
	<hr/>	\$2,146.96

Said last two payments were made to, and collected by, Richard Nickell, who was then the acting Collector of Internal Revenue for said First District of California, and which payments had been demanded by him.

XX.

The total amount so paid by plaintiff was \$35,-269.85, consisting of:

Tax (Title IX)	\$ 5,933.72	
Employer's tax (Title VIII).....	15,785.57	
Employer's tax (Title VIII) paid by plaintiff from its own funds and not repaid to it	6,195.77	
Penalties (under Title IX)	976.21	
Penalties (under Title VIII).....	4,019.84	
Interest (under Title IX).....	404.13	
Interest (under Title VIII).....	1,954.61	
	<hr/>	\$35,269.85
		[11]

XXI.

Said Clifford C. Anglim continued in office as such Collector of Internal Revenue to and including May 31, 1942, since which date he has not been, and it not now, in office as such Collector. From July 1, 1942, to December 31, 1942, Richard Nickell was the acting Collector of Internal Revenue for said First District of California, since which date he has not been, and is not now, in office as such acting Collector or as Collector.

XXII.

On August 3, 1943, plaintiff filed with the Collector of Internal Revenue for the First District of California its twelve verified claims for the refund of all of the taxes, penalties and interest so paid by

it. A separated itemized claim was filed for the tax, penalty and interest so paid under said Title IX for each of the six calendar years 1936 and 1941, both inclusive, and a separate itemized claim was filed, for the tax, penalty and interest so paid under said Title VIII, for each of the six calendar years 1937-1942, both inclusive. Said claims were on printed Form No. 843 prescribed and provided therefor by the Treasury Department of the United States for claims for refund of taxes illegally collected. Each of said claims stated all the matters and things by said Form 843 required to be stated therein, viz: the district in which the returns for taxes were filed; the period for which the tax was paid; the character of the tax; the amount of the tax, and of the penalty and interest; the date of payment; the amounts to be refunded, (which corresponded to the amounts so paid by plaintiff), the time within which the claim could be legally filed expired, and, as the grounds therefor, the matters set forth in Exhibit "A" hereto attached, which is hereby [12] referred to and made a part of this complaint. In addition, each of the claims for the taxes so paid and which had allegedly accrued prior to April 1, 1939, and for the penalties and interest in respect thereof, set forth, as additional grounds therefor, that the same were retroactively and illegally assessed and collected and also the matters alleged in "Exhibit B" hereto annexed, which is hereby referred to and made a part of this complaint. Each of said claims was signed by plaintiff and verified by the oath of its president. On October 26, 1943, the

United States Commissioner of Internal Revenue officially notified plaintiff, in writing, that all of said claims were disallowed on the ground that plaintiff was "an organization organized exclusively for social welfare" and was not a "corporation organized and operated exclusively for charitable purposes."

Wherefore, plaintiff demands judgment against said defendant for the sum of \$35,269.85, with interest thereon and costs of suit.

P. A. BERGEROT

A. P. DESSOUSLAVY

Attorneys for plaintiff [13]

United States of America

State and Northern District of California—ss:

Emile J. Pierron, being first duly sworn, deposes and says:

That he is an officer, to-wit: President of La Societe Francaise De Bienfaisance Mutuelle, the plaintiff named in the foregoing complaint; that said plaintiff is a corporation, and that, for that reason and as such officer, affiant makes this affidavit on its behalf; that he has read said complaint and that he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that, as to such matters, he verily believes it to be true.

EMILE J. PIERRON

Subscribed and sworn to before me this 20 day of November, 1943

[Seal]

FRED BROWN

Notary Public in and for the City and County of San Francisco, State and Northern District of California.

My Commission Expires August 27, 1947. [14]

EXHIBIT "A"

Said La Societe Francaise de Bienfaisance Mutuelle is now, and ever since its incorporation in 1856 has been, a corporation organized and operated exclusively for charitable, scientific and educational purposes, to-wit: the treatment of the sick without profit, no part of the net earnings of which enures, or ever has enured, to the benefit of any private shareholder or individuals.

Taxpayer was founded in San Francisco December 28, 1851, as an unincorporated charitable society to treat the sick, and on June 7, 1856 was incorporated under Chapter VIII of the California Corporation Act of 1850, "Relating to Religious and other associations and societies". Its only activity is, and always has been, the treatment of the sick without profit.

Taxpayer has never had any capital stock, and no interest, dividends or other pecuniary distributions, or sick or death benefits, have ever been paid to any one. Any net earnings have always been applied to the improvement of its services. Its affairs are managed by a board of fifteen directors

elected annually by the members, and who serve without any fees, salary or compensation whatever. At the time involved, it had, and still has, nearly ten thousand members. Its membership is unlimited, and it has always admitted new members.

Taxpayer was originally founded by donations, and its hospital and plant (on the block of land in San Francisco, California, bounded by Geary Boulevard, Fifth and Sixth Avenues and Anza Street) have mainly been acquired by testamentary and other gifts and the income therefrom. Taxpayer, though in part maintained by members' dues and admission fees, has set up a relief fund to pay the dues of needy widows and orphans and other needy members, for whom it cares without charge.

Taxpayer's only purpose is, and always has been, to treat the sick, and to treat an indefinite and unlimited number thereof, and to give to such persons as adequate and complete treatment as possible, and this not for profit but at the lowest possible charge, consistent with its continued solvency. In addition, taxpayer maintains at its hospital an Old Peoples' Home for elderly members who are admitted thereto, either without charge or on a nonprofit basis, and gives free emergency treatment (about three hundred cases per year) to deserving cases in its neighborhood and also gives other forms of gratuitous relief. It is a nonprofit agency of the Community Chest of San Francisco.

Taxpayer, accordingly, claims that, as a nonprofit hospital corporation, it is, and always has been, a charitable corporation within the meaning of Sections 1426(b)(8) and 1607(c)(7) of the Federal

Internal Revenue Code, and of the corresponding Sections of the Social Security Act.

On July 14, 1937, Charles T. Russell, as Deputy United States Commissioner of Internal Revenue, officially notified taxpayer, in writing, that it was "exempt from payment of the taxes imposed by the Social Security Act, approved August 14, 1935, inasmuch as you come within the exceptions provided in Section 811(b)(8) of Title VIII and Section 907(c)(7) of Title IX." [15]

EXHIBIT "B"

Thereafter, on April 3, 1939, by a written communication bearing said date, Victor A. Self, as acting Deputy Commissioner of Internal Revenue, officially notified taxpayer, in writing, that it "and its employees are liable for the taxes imposed by Title VIII of the Social Security Act," and, (as was the fact), if taxpayer was an employer of eight or more individuals, "it was also liable for the tax imposed by Title IX thereof."

Following its receipt of said communication of July 14, 1937, taxpayer had refunded to its employees the amounts theretofore deducted from their wages, pursuant to said Title VIII, and thereafter and until the receipt of said communication of April 3, 1939, discontinued any further deductions from their wages.

[Endorsed]: Filed Nov. 23, 1943. [16]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by its attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, and answers the complaint herein as follows:

I. Admits that the plaintiff is a California corporation and that its principal place of business is in the city and county of San Francisco and in the Northern District of California, but denies the remaining allegations contained in paragraph I of the complaint.

II. The allegations contained in paragraph II of the complaint are denied.

III. The allegations contained in paragraph III of the complaint are denied for lack of sufficient knowledge and information.

IV. The allegations contained in paragraph IV of the complaint are denied for lack of sufficient knowledge and information.

V. The allegations contained in paragraph V of the complaint are denied for lack of sufficient knowledge and information. [17]

VI. The allegations contained in paragraph VI of the complaint are denied for lack of sufficient knowledge and information.

VII. The allegations contained in paragraph VII of the complaint are denied for lack of sufficient knowledge and information.

VIII. The allegations contained in paragraph

VIII of the complaint are denied for lack of sufficient knowledge and information.

IX. The allegations contained in paragraph IX of the complaint are denied for lack of sufficient knowledge and information.

X. The allegations contained in paragraph X of the complaint are denied.

XI. The allegations contained in paragraph XI of the complaint are denied for lack of sufficient knowledge and information.

XII. The allegations contained in paragraph XII of the complaint are denied for lack of sufficient knowledge and information.

XIII. The allegations contained in paragraph XIII of the complaint are denied for lack of sufficient knowledge and information.

XIV. The allegations contained in paragraph XIV of the complaint are denied for lack of sufficient knowledge and information.

XV. The allegations contained in paragraph XV of the complaint are denied for lack of sufficient knowledge and information.

XVI. Admits that on July 14, 1937, Charles T. Russell as Deputy Commissioner notified plaintiff in writing that it was [18] exempt from payment of taxes imposed by the Social Security Act, Title VIII, and that it was entitled to exemption under the provisions of Section 101(6) of the Revenue Act of 1936, but denies the remaining allegations contained in paragraph XVI of the complaint.

XVII. The allegations contained in paragraph XVII of the complaint are admitted.

XVIII. The allegations contained in paragraph XVIII of the complaint are admitted.

XIX. Admits the allegations contained in lines 15 to 22, inclusive of paragraph XIX of the complaint.

(a) Admits that the taxes, penalty and interest under Title IX of the Social Security Act in the total sum of \$673.35 were paid for the calendar year 1936, but alleges the payment thereof was made on August 14, 1940, according to the records of the Collector of Internal Revenue.

For calendar year 1937:

Admits that tax, penalty and interest in the sum of \$1,319.46 were paid for 1937, but alleges that payment was made on August 14, 1940, according to the records of the Collector of Internal Revenue.

For calendar year 1938:

Admits that tax, penalty and interest in the sum of \$1,984.99 were paid, for 1938 but alleges that payment was made on August 14, 1940, according to the records of the Collector of Internal Revenue.

For calendar year 1939:

Admits that tax, penalty and interest in the sum of \$1,717.95 were paid for 1939, but alleges that payment was made on August 14, 1940, according to the records of the Collector of Internal Revenue.

[19]

For calendar year 1940:

Admits that tax in the sum of \$812.65 was paid for 1940, but alleges that payment was made on January 27, 1941.

For calendar year 1941:

Admits that tax in the sum of \$805.66 was paid

for 1941, but alleges that payment was made on January 31, 1942.

(b) Admits that tax, penalty and interest were assessed and collected under Title VIII of the Social Security Act as follows:

For calendar year 1937:

Admits that tax, penalty and interest in the sum of \$7,527.81 were paid for 1937, but alleges that payment was made on November 4, 1940, according to the records of the Collector of Internal Revenue. For lack of sufficient knowledge and information it is denied that plaintiff paid any part of this sum from its own funds.

For calendar year 1938:

It is admitted that at least \$7,853.10 was paid, but alleges that according to the records of the Collector of Internal Revenue such payment was made August 14, 1940. For lack of sufficient knowledge and information it is denied that any part of this sum was paid by plaintiff from its own funds.

For calendar year 1939:

Admits that taxes at least in the sum of \$5,091.08 were paid, but denies the correctness of the allegations contained in the complaint as to the date of such payments and further denies for lack of sufficient knowledge and information that any portion of the sums paid represented sums paid by plaintiff from its own funds. [20]

For calendar year 1940:

Denies that payments in excess of \$691.93 were made for the first quarter and alleges that such payments were made on August 14, 1940, according to the records of the Collector of Internal Revenue.

For the second quarter of 1940 it is admitted that \$683.50 was paid as tax, together with interest of \$3.42 thereon, but alleges that such payments according to the records of the Collector were made on August 14, 1940, and September 5, 1940, respectively.

It is admitted that tax in the sum of \$664.62 was paid, but alleges that according to the records of the Collector such sum was paid on October 21, 1940. It is also admitted that tax in the sum of \$583.24 was paid, but alleges that according to the Collector's records such sum was paid January 27, 1941.

For calendar year 1941:

It is admitted that a total of \$2,685.52 was paid in taxes for this year, but it is denied that payments were made on the dates alleged, according to the records of the Collector of Internal Revenue.

For calendar year 1942:

It is admitted that the plaintiff paid at least \$2,146.96 in taxes for 1942, but it is denied that the payments were made on the dates alleged in the complaint, but it is admitted that they were collected by Richard Nickell, who was then acting Collector of Internal Revenue for the First District of California.

XX. Denies that the total amount of taxes, interest and penalty claimed to have been paid under paragraph XIX above amounts to \$35,269.85 as alleged in paragraph XX of the complaint. [21]

XXI. Admits the allegations contained in paragraph XXI of the complaint, except that it is alleged that Richard Nickell became acting Col-

lector on June 1, 1942, and not July 1, 1942, as alleged in the complaint.

XXII. Admits the allegations contained in this paragraph as alleged in lines 24 to 30, inclusive, on page 12 and lines 1 to 6, inclusive, on page 13 of the complaint, but denies the remaining allegations contained in said paragraph.

Wherefore defendant demands judgment against the plaintiff dismissing the complaint, together with costs and disbursements of this action.

FRANK J. HENNESSY

United States Attorney.

[Endorsed]: Filed Mar. 31, 1944. [22]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 27th day of June, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

TRIAL—MOTION FOR JUDGMENT FOR THE
PLAINTIFF

DENIED—MOTION FOR JUDGMENT FOR
THE DEFENDANT

DENIED—ORDERED BRIEFS FILED AND
CASE SUBMITTED

This case came on regularly this day for trial before the Court sitting without a jury, neither party having demanded a trial by jury. A. P. Dessouslavy, Esq., was present for the plaintiff, and Miss Esther B. Phillips was present for the defendant. Mr. Dessouslavy and Miss Phillips made opening statements to the Court on behalf of the respective parties. Edward Pomme and P. A. Bergerot were sworn and testified on behalf of the plaintiff. Mr. Dessouslavy introduced in evidence and filed Plaintiff's Exhibits Nos. 1 to 14, inclusive. Miss Phillips stated to the Court that the defendant would offer no evidence, whereupon the evidence was closed. Mr. Dessouslavy made a *motion* for judgment for the plaintiff, which motion was denied. Miss Phillips made a motion for judgment for the defendant, which also was denied. It is Ordered that briefs be filed herein in 10, 10 and 10 days, the case then to be submitted. [23]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 3rd day of October, in the year of our Lord one thousand nine hundred and forty-four.

[Title of Cause.]

Present: The Honorable A. F. St. Sure, District Judge.

JUDGMENT FOR PLAINTIFF

This case heretofore having been heard and submitted and being now fully considered and the Court having filed its written opinion thereon, it is Ordered, in accordance with said opinion, that plaintiff have judgment with costs as prayed for in accordance with an order this day signed and filed. [24]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Ordered: Plaintiff may have judgment as prayed for, with costs. Counsel for plaintiff may submit findings of fact and conclusions of law.

Opinion filed.

Dated: October 3, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Oct. 3, 1944. [25]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge:

Upon proper claim for refund plaintiff sues to recover \$35,269.85 paid by it for taxes, interest and penalties assessed by defendant under Titles VIII and IX [26] of the Social Security Act (approved August 14, 1935, 49 Stat. 620). The question for decision is whether the fact that plaintiff, a non-profit hospital, has paying members who receive medical, hospital, and other benefits from their membership, subjects plaintiff to Social Security taxes.

Plaintiff claims exemption from payment of the taxes as a charitable organization under Internal Revenue Code § § 1426(b)(8), relating to the old age pension, and 1607(c)(8), relating to unemployment insurance, each of which provides that "the term 'employment' does not include: * * * Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Plaintiff society was founded in San Francisco in 1851 to treat the destitute sick. In 1856 it was incorporated under Chapter VIII of the California Corporation Act of 1850 "Relating to Religious and other Associations or Societies", (California Stats. 1850, p. 373), and has continued its corporate exist-

ence thereunder. It operates a large general hospital known as the French Hospital which is open to the public, a home for elderly members to which they are admitted without charge or on a non-profit basis, and a nurses' training school accommodating 75 nurses. It also trains about six interns a year.

Plaintiff has no capital stock or shareholders. It has never paid dividends, interest, or sickness or death [27] benefits. Defendant admits that plaintiff, under its bylaws, cannot pay a dividend out of its net earnings to anyone. Its directors and officers serve gratuitously. Since its inception plaintiff has received donations and bequests amounting to more than \$360,000, and has received other substantial public support by way of subscriptions and loans. Any surplus from its operations is invested in the hospital plant or held in reserve for that purpose.

Plaintiff's income is derived in part from dues paid by members of its society. Requirements for membership (apart from health or age) are that applicant be of French birth or descent, or the member of the immediate family of a qualified member, or that he speak French. The last requirement is broadly construed. Plaintiff's membership is open, and it has about 9700 members. Monthly dues range from \$1.00 a month for children to \$1.75 for adults. Life memberships are sold for \$1500. Members are entitled to receive medical and hospital care gratuitously in some instances and at a small charge in others. A fund has been established for the aid of destitute members.

Plaintiff maintains two free beds for non-mem-

bers who are unable to pay for hospitalization, and gives free emergency treatment to personal injury cases arising in its neighborhood.

While there was no testimony produced at the trial with regard to taxes paid by San Francisco hospitals other than plaintiff, it is admitted by defendant that with the exception of plaintiff and several strictly proprietary [28] hospitals, the San Francisco hospitals do not pay social security taxes to the United States; that while some of the hospitals which are not taxed are exempt under other provisions of the Act, such as those operated by churches or religious groups ("religious * * * purposes"), or in connection with and as an integral part of a medical school ("educational purposes"), or by a political subdivision of the state (Section 1607(c)(6)), there are in fact five large hospitals open to the public, organized on a non-profit basis, which have none of the above exemptions and are not taxed.

Defendant states that the distinction between plaintiff and four of those hospitals is that plaintiff is composed of a society of members who own and operate the French Hospital "for mutual benefit", a factor which is probably not present in the other hospitals. As to the fifth hospital, it appears from plaintiff's reply brief that it is operated by a closed membership. Defendant states "We are not sufficiently informed as to the differences between that hospital and plaintiff to be able to distinguish them." The record is silent in this regard.

Plaintiff has all the attributes of a non-profit hospital, unless its character as such is changed by

its membership plan. If so, it would follow that if other non-profit hospitals, not now subject to tax, should in the future adopt such a progressive and salutary plan, they would be penalized by the levy of social security taxes.

In 1937 the Deputy Commissioner of Internal Revenue notified plaintiff that it was exempt from payment of social security taxes. However in 1939 this ruling was [29] reversed by the Acting Deputy Commissioner. The reason for the change does not appear.

As plaintiff states, the hospital cannot rely exclusively on irregular charitable donations. The periodical contributions of its members enable it to continue and expand its beneficial activities. The members receive in exchange a form of insurance against the large expense of serious illness. Depending on the state of his health, the individual member may never receive any benefit from his dues, other than a sense of security, or he may receive benefits in excess of the amount of money he has paid in. The members have no interest in the hospital plant and other assets of the society other than the right to use its facilities.

As authority that the fact that the individual members benefit by their membership does not prevent the hospital from being a charitable institution, plaintiff cites *U. S. v. Proprietors of Social Law Library*, 102 F. (2d) 481. The facilities of the library were open to citizens of Boston who were willing to aid in its upkeep by becoming "proprietors" or "subscribers". Certain Federal officers were entitled to free use of the library. No part

of the earnings of the corporation were paid to any shareholder, but were used to improve the facilities of the library. The Government attempted to impose a capital stock tax on the corporation, claiming that the net earnings inured to the benefit of the shareholders or individuals because any improvements rendering the library more serviceable to [30] its members were of special benefit to them. The court said, "but though every improvement in a charitable institution confers additional benefits on those using it, or availing themselves of its benefits, such benefits have never been considered as taking the institution out of the class of charitable institutions because it has enabled it to do better educational, literary or charitable work, or because it resulted in distributing its benefits among private shareholders or individuals."

Following the same reasoning, the fact that the members benefit from the use of the hospital should not alter its character as a non-profit hospital. The members pay for the service they receive. The public, of course, pays higher rates for hospitalization than the members, for it has not contributed monthly payments to the hospital. But there is no showing that the members receive less costly treatment at the expense of the public, or that the amount of dues charged is not commensurate with the cost of treating the membership as a whole. The proof shows that in the eighty-seven years of its history, plaintiff has occasionally made a profit, has sometimes come out even, and has more often sustained a deficit. When profits are made or charitable do-

nations received, both the membership and the public benefit by the improvements in hospital facilities made possible thereby.

In *La Societe Francaise v. California Employment Commission*, 56 C.A. (2d) 534, the California District Court of Appeals decided that this plaintiff was liable for state social security taxes. The court said it was unable to [31] agree with appellant (plaintiff here) as to the view, purpose and intent of Congress that hospitals not operated for profit are charitable institutions. In support of its reasoning it cited the case of *Hassett v. Associated Hospital Service Corporation*, 125 F (2d) 611. This case is discussed in defendant's brief in the case at bar. However, as counsel for defendant comments, the Associated Hospital Service Corporation did not own or operate a hospital, nor did it receive charitable donations. It contracted for medical and hospital care for its members in a number of hospitals. The Circuit Court of Appeals held that such an association is not a charitable organization and is liable for social security taxes. It discussed the *Social Law Library* case, *supra*, saying: "That case is distinguishable from the case at bar. While the facts in both cases are nearly the same, we feel that the plaintiff corporation is more akin to a business organization than the one involved in the *Social Law Library* case. There the corporate capital was composed in good part of charitable gifts, the payment of a fee was not prerequisite to the receipt of benefits in every case and the fee did not bear an exact relation to the cost of the benefit conferred."

Plaintiff has all the attributes of the Social Law Library which are mentioned as points of distinction between the Library case and the Hassett case. Charitable gifts compose a substantial portion of its capital; the payment of a fee is not prerequisite to the receipt of benefits in every case, for as above stated, the hospital gives free emergency treatment, maintains two free beds for non-members, and provides certain benefits for indigent [32] members; the fee does not bear an exact relation to the cost of the benefits conferred, for being supported in part by charity, the hospital is enabled to maintain a better plant and render greater service to its members and the public than if it were wholly supported by private capital. Also, plaintiff's activities in training nurses and interns render it, at least in part, an educational institution.

Defendant cites *In re Farmers' Union Hospital Ass'n of Elk City (Wash.)*, 126 P. (2d) 244, in support of its argument that a hospital operated for the benefit of its membership is not operated for a charitable purpose. In that case the hospital generally made an annual profit which was used to increase its facilities and reduce the cost of service to its members for the following year. The court also found that no conscious effort was made to bestow charitable benefits upon any person not connected with the organization. Neither of these facts appear in the present case.

The provisions of the Social Security Act exempting charitable organizations should be liberally

construed. *Hassett v. Associated Hospital Service Corporation*, 125 F. (2d) 611; *U. S. v. Proprietors of Social Law Library*, 102 F. (2d) 481. Non-profit hospitals have frequently been held, for purposes of taxation, to be charitable institutions, although they receive paying patients, so long as a portion of their work is charitable. *Commissioner of Internal Revenue v. Battlecreek Inc.*, 126 F. (2d) 405; *In re Mendelsohn*, 31 N.Y.S. (2d) 435; *In re Rust's Estate*, 12 Pac. (2d) 396; *New England Sanitarium v. Inhabitants of Stoneham*, 91 N.E. 385; *State v. H. Longstreet Taylor Foundation*, 269 N.W. 469; [33] *Virginia Mason Hospital Ass'n v. Larson*, 114 Pac. (2d) 976. In *Butterworth v. Keeler* (N.Y.) 114 N.E. 803, Mr. Justice Cardozo said that non-profit "universities and hospitals are unquestionably public charities"; and in *Slee v. Commissioner*, 42 F. (2d) 184, Judge Learned Hand observed that the object to maintain health without profit "has been a recognized kind of charity from time immemorial."

The Attorney General of the United States on November 2, 1943, advised the President that the Social Security Act is not applicable to non-profit hospitals. He based his conclusion on the fact that non-profit hospitals have been uniformly exempted from the provisions of the income tax law under an identical exemption clause (Section 101(6) of the Internal Revenue Act of 1936); and that when formulating the Social Security Act Congress showed its intent in this regard by refusing an amendment specifically exempting hospitals as sur-

plusage because of the uniform construction of identical language by the Bureau of Internal Revenue as exempting non-profit hospitals, "and also on the fear that the insertion of the words added by the Senate amendment might interfere with the continuation of the long-continued construction of the income-tax law." H. Rept. 1540, 74th Cong., 1st Session, p. 7. Opinions of Attorneys General, Vol. 40, Op. No. 72.

An organization such as plaintiff's is of great public benefit. It enables a person of limited means, through the payment of small monthly sums, to receive medical care without resorting to public charity. The need for such [34] protection has long been recognized, and there has been agitation for compulsory insurance of this type. A non-profit hospital which has no stock and pays no dividends renders a public service, and I think Congress has clearly shown its intent to exclude such hospitals from the provisions of the Act.

Plaintiff may have judgment as prayed for.

* * * * *

October 3, 1944.

[Endorsed]: Filed Oct. 3, 1944. [35]

[Title of District Court and Cause.]

FINDINGS

The above entitled action was tried to the court June 27, 1944, Messrs. P. A. Bergerot and A. P.

Dessouslavy appearing as counsel for plaintiff, and Frank J. Hennessy, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, appearing as counsel for defendant;

Evidence, oral and documentary, was thereupon introduced, and the court being fully advised in the premises, now finds the following to be the facts:

1. Plaintiff is now, and ever since June 7, 1856, has been, a corporation incorporated pursuant to and in accordance with Chapter VIII (relating to "Religious and other Associations or [36] Societies") of the California Corporation Act of 1850. Its residence, office and principal place of business at all times have been in the City and County of San Francisco, State and Northern District of California. It was incorporated as the successor of, to take charge of the estate and property belonging to, and to transact all affairs relative to the temporalities of, an unincorporated beneficial society of the same name founded in San Francisco December 28, 1851, for the purpose of caring for and treating the sick without profit.

2. Plaintiff's sole purpose ever since its incorporation has been, and now is, the care and treatment of the sick without profit. To that end it has always maintained, and now maintains, a nonprofit hospital.

3. Plaintiff has not now, and has never had, any capital stock. No dividends, interest, sick or death benefits, or other pecuniary benefits or distributions are now, or have ever been, paid to any one. No part of its net earnings enures, or ever has enured,

to the benefit of any private shareholder or individual.

4. At the time of the commencement of this action, and for many years prior thereto, and prior to August 14, 1935, plaintiff's affairs have been managed by a board of fifteen directors, elected annually by the members, and who serve without any fee, salary, or other compensation whatever.

5. Plaintiff has been able to acquire and enlarge its present hospital plant and facilities mainly through testamentary and other gifts and the income therefrom. Receipts from members would not have been sufficient therefor. The assets acquired by plaintiff in 1856 from its predecessor had largely consisted of charitable gifts and donations. Since 1851, gifts, legacies and devises [37] have aggregated more than Three Hundred and Sixty Thousand (360,000.00) dollars. In the absence thereof, plaintiff could not have acquired, improved or enlarged its present plant nor afford the facilities which it now furnishes. On February 29, 1944, the date of the close of plaintiff's last fiscal year, there was carried on its books a reserve amounting to Two hundred and twenty-one thousand six hundred and twenty-seven and 76/100 (221,627.76) dollars, of which Seventy-six thousand seven hundred and eighty-three and 87/100 (76,783.87) dollars was made up of such gifts, and the balance, viz: One hundred and forty-four thousand eight hundred and thirty-six and 89/100 (144,836.89) dollars, represented its Depreciation Fund. By plaintiff's By-Laws, such reserve is set aside for the improvement, enlargement, and betterment of its plant and facili-

ties. Said Chapter VIII of said Corporation Act of 1850 authorizes plaintiff to take and hold property, real and personal, by gift or devise, and to take, hold and improve real and personal property and to erect hospitals and other buildings.

6. Prior to 1895, plaintiff owned and operated a general hospital in said City and County of San Francisco. In and after 1894 it erected, and has since owned and operated, a general hospital (now comprising eleven buildings) on its block of land in San Francisco bounded by Geary Boulevard, Anza Street and Fifth and Sixth Avenues. It has a capacity of 225 beds, (seventy-six in private rooms and one hundred forty-nine in wards), and a nursery with fifteen cribs, and is open to the public at large without distinction as to race, creed or color. Said hospital was at the time of the commencement of this action, and long prior thereto, had been, approved by American Medical Association and American College of Surgeons as a "Class A" Hospital. At and [38] ever since the commencement of this action, and long prior thereto, the equipment, services and facilities of said hospital were adapted and available for the treatment of every kind of human sickness. In plaintiff's fiscal year ending February 28, 1944, the average daily number of hospitalized patients was 189.71, and the number of patient-days, viz: the total number of days' treatment given to all hospitalized patients, was 69,437. In plaintiff's eight fiscal years ending February 29, 1944, the average daily number of hospitalized patients was 171.40 and the average annual number of

patient days in said period was 64,222. In said fiscal year ending February 29, 1944, there were 26,329 consultations by members at, or calls on members by the medical staff outside, the hospital. In its last eight fiscal years ending February 29, 1944, the same annually averaged 26,987.

7. Plaintiff maintains, in connection with said hospital, and ever since 1895, has maintained, at about an average annual cost of about \$12,000, a Training School for nurses for the care of the sick, injured and infirm. It was the first such school organized on the Pacific Coast. It is approved and accredited by the Board of Nurse Examiners of the State of California. There is now, and ever since 1923 has been, situate on said block of land a large four story and basement brick building built and used exclusively as a training home for nurses and devoted wholly to their education, training, lodging and maintenance, where they take a three-year course in connection with the hospital. In addition, in the main hospital building, there are two fully equipped class rooms for said student nurses and a dietetic school room. There are usually sixty to seventy student nurses enrolled and following the course of study. [39]

8. Said hospital is accredited by American Medical Association for the training of interns, and, as such, a scientific and teaching institution for future physicians. There are usually not less than six interns in said hospital, each of whom is a graduate of an accredited Medical School and takes, at said Hospital, a one-year course in order to obtain

a wide field of experience, and where they are directed and trained under the supervision of the medical staff.

9. Plaintiff, in said hospital, also maintains, from current income, an Old People's Home for the care of aged and feeble members, with a capacity of fifteen beds at all times fully occupied. To said Home there are admitted, for benevolent purposes only, and subject to the discretion of the Board of Directors, (a) members over sixty-five years of age, who pay for their admission thereto a sum of money determined by said Board according to the circumstances of each case, but which sum is not based upon any fixed schedule of rates or upon any profit-making basis, but upon the applicant's needs and ability (if any) to pay and upon social and humane considerations and is not designed to yield a profit, and (b) members who have been such for at least thirty consecutive years and who are past sixty-five years of age and who, though not ill, are unable, on account of old age or physical disability, to earn a living, no charge being made for their admission.

10. Plaintiff affords other charitable relief. (a) It provides, at its hospital, two permanent free beds for the treatment of indigent persons under the patronage of La Societe de Secours des Dames Francaises, (French Ladies Relief Society), an independent charitable corporation in San Fran- [40] cisco. (b) It is situated on one of the main traffic thoroughfares of San Francisco, and gives free

emergency treatment if necessary, (an average of about 300 annually), to all deserving cases in its neighborhood.

11. The number of plaintiff's members is now, and always has been, without limit. It has always admitted, and now admits, new members. At the time of the commencement of this action its membership was about 9,700 and at the dates of the various payments hereinafter referred to, its membership averaged about 9,800. It does not solicit, and never has solicited, new members, and has never paid any commission or compensation to any one to obtain new members. It has only one class of members, who pay monthly dues of \$1.75, except (a) life members who pay upon their admission, but whose rights are otherwise the same, and (b) children under fifteen years, one of whose parents is a member, pay one dollar per month.

12. Continued payment of members' dues is not, however, necessarily a condition to relief. In the case of indigent member-widows, and of other needy members, such dues, at the discretion of the Board of Directors, are paid from plaintiff's relief fund originally set up in 1905 for that purpose, and since added to. In the Board's discretion, other indigent members are cared for in illness without charge, and without limit of time, and are furnished private rooms and other needed facilities. A member under seventeen years of age, if orphaned or abandoned by his parents, pays no dues, nor do members in the armed forces of the United States nor student nurses who are members.

13. At the time of the commencement of this action, plaintiff's members were entitled to the following benefits, either [41] without any charge or at a discount from prevailing prices, viz:

1. Medical and surgical care and consultations are given, without charge, to plaintiff's members by staff of physicians specially appointed therefor, who give consultations either at, or outside of, said hospital;

2. Hospitalization is given, without charge, including operating room service, drugs, dressings, Board and Room, up to and not to exceed six months in any one year, (but in tuberculosis cases the time of hospitalization is unlimited), except for a charge of fifty cents per day when hospitalized in a ward, and of about fifty per cent of prevailing prices when hospitalized in private room;

3. Special discounts (from ten to ninety per cent of prevailing prices) on drugs and dressings, and on all X-Ray examinations and treatments, on Diathermy, Hydrotherapy, Physiotherapy treatments, Metabolism examinations, electrocardiograms, and in obstetrical cases.

These, if not more, were the benefits to which they were entitled at the various times since August 14, 1935.

14. The annual expense of the operation and maintenance of the hospital, including the cost of medical, surgical and clinical services to hospitalized and nonhospitalized members, general administrative expense, and the periodical modernization and improvement thereof and of its equipment, is

derived from (1) members' monthly dues; (2) admission fees of new members of \$25 and upwards, according to age; (3) income from plaintiff's securities and other investments; (4) donations, legacies and bequests, (5) life membership fees; (6) special admission fees from life boarders; and (7) receipts from non-member hospitalized patients. [42]

15. Whenever, in any year, the funds so received have been in excess of the amount of such expenses, such excess has been credited to a surplus accumulated in furtherance of the accomplishment of the plaintiff's non-profit purpose. The net deficiency, if any, in any year has been paid out of such surplus.

16. Ever since January 1, 1936, and for many years continuously prior thereto, there has been no change in plaintiff's said plan and method of operating said hospital. On July 14, 1937, Charles T. Russell, as Deputy United States Commissioner of Internal Revenue, officially notified plaintiff, in writing, that it was "exempt from payment of the taxes imposed by the Social Security Act, approved August 14, 1935, inasmuch as you come within the exceptions provided in Section 811(b)(8) of Title VIII and Section 907 (c) (7) of Title IX", and, further, that it was "entitled to exemption under the provisions of Section 101 (6) of the Revenue Act of 1936."

17. On February 24, 1939, the then acting United States Commissioner of Internal Revenue officially notified plaintiff, in writing, that "it appears you

are not operated for profit and do engage in substantial charitable activities", but that it was not entitled to exemption from income tax under the provision of Section 101 (6) of the Revenue Act of 1938 as a corporation organized and operated exclusively for charitable purposes, and that "the ruling contained in Bureau letter of July 14, 1937 is modified accordingly." Said communication further stated that "the status of your organization for Social Security Tax purposes will be made the subject of a separate communication". Thereafter, on April 3, 1939, Victor H. Self, as the acting Deputy Commissioner of Internal Revenue, officially notified plaintiff, [43] in writing, referring to said communication of February 24, 1939, and stating that plaintiff was not entitled to exemption under Sections 811(b)(8) of Title VIII, and Section 907(c)(7) of Title IX, of said Social Security Act.

18. Afater the receipt of said communication of July 14, 1937, plaintiff refunded to its employees all the contributions which it had theretofore deducted from their wages pursuant to said Act, and thereafter discontinued such deductions until said communication of April 3, 1939. The taxes payable pursuant to said Act for the period between January 1, 1937, and March 31, 1939, including the tax upon employees' wages, with the penalties and interest thereon, were paid by plaintiff entirely from its own funds, and no part of such payments represents amounts ever deducted or withheld from the wages of income of any employees or ever repaid by and employee in whole or in part.

19. Except only as to the name of the person by whom the same were collected, plaintiff, on the respective dates hereinafter set forth, paid to, and there was collected by, Clifford C. Anglim, as Collector of Internal Revenue for the First District of California, the following amounts for taxes assessed upon it in alleged conformity with said Social Security Act, with interest thereon and the penalties in respect thereof, payment of all whereof had been demanded of it by said Collector;

(a) Taxes assessed and collected allegedly pursuant to Title IX of the Social Security Act, (Sections 1600 and following of Internal Revenue Code), with penalties and interest thereon:

For calendar year 1936:

Tax	\$462.12	
Penalty	115.53	
Interest	95.70	
		<hr/>
		\$673.35

Said payments were all made Aug. 14, 1940. [44]

For calendar year 1937:

Tax	\$944.36	
Penalty	236.09	
Interest	139.01	
		<hr/>
		\$1,319.46

Said payments were all made August 14, 1940.

For calendar year 1938:

Tax (in part)	\$1,484.32	
Penalty	371.09	
Interest	129.58	
		<hr/>
		\$1,984.99

Said payments were all made August 14, 1940.

For calendar year 1939:

Tax (in part)	\$1,424.61	
Penalty	253.50	
Interest	39.84	
		<hr/>
		\$1,717.95

Said payments were all made August 14, 1940.

For calendar year 1940:

Tax—\$812.65 paid January 20, 1941.

For calendar year 1941:

Tax—\$805.66 paid January 31, 1942:

(b) Taxes, penalty and interest assessed and collected allegedly pursuant to Title VIII of the Social Security Act, (Sections 1400 and following of Internal Revenue Code).

For calendar year 1937:

Tax	\$5,229.96	
Penalty	1,307.49	
Interest	990.36	
		<hr/>
		\$7,527.81

Said payments were all made October 30, 1940. Of said sum of \$5,229.96, one half, or \$2,614.98 represented employees' contributions paid by plaintiff from its own funds. [45]

For calendar year 1938:

Tax	\$5,750.92	
Penalty	1,437.74	
Interest	664.44	
		<hr/>
		\$7,853.10

Said payments were all made August 14, 1940. Of said sum of \$5,750.92, one half, or \$2,875.46, represented employees' contributions paid by plaintiff from its own funds.

For calendar year 1939:

Tax	\$ 17.59	paid July 19, 1939
Tax	21.95	paid Oct. 23, 1939
Tax	19.65	paid Jan. 23, 1940
Tax	3,500.11	
Penalty	1,262.31	
Interest	279.47	
	<hr/>	\$5,091.08

Said last three amounts were paid August 14, 1940. Of said sum of \$3,500.11, \$705.33 represented employees' contributions paid by plaintiff from its own funds.

For calendar year 1940:

Tax (first quarter)	\$677.32	
Penalty	12.30	
Interest	16.92	
	<hr/>	\$706.54

Said sums were paid August 14, 1940.

Tax (second quarter)	\$683.50	paid Aug. 14, 1940
Interest thereon	3.42	paid Sept. 10, 1940
	<hr/>	\$686.92

Tax.....	\$664.62	paid October 21, 1940
Tax.....	583.24	paid January 20, 1941

For calendar year 1941:

Tax.....	\$ 670.34	paid April 19, 1941
Tax.....	673.47	paid July 9, 1941
Tax.....	661.21	paid Oct. 17, 1941
Tax.....	680.50	paid Jan. 16, 1942
	<hr/>	\$2,685.52

[46]

For calendar year 1942:

Tax.....	\$ 710.76	paid April 20, 1942
Tax.....	716.40	paid July 20, 1942
Tax.....	719.80	paid October 13, 1942
	<hr/>	\$2,146.96

Said last two payments were made to, and collected by, Richard Nickell, who was then the acting Collector of Internal Revenue for said First District of California, and which payments had been demanded by him.

20. The total amount so paid by plaintiff was \$35,269.85, consisting of:

Tax (Title IX)	\$ 3,933.72	
Employer's tax, (Title VIII).....	15,785.57	
Employees' tax, (Title VIII) paid by plaintiff from its own funds and not repaid to it	6,195.77	
Penalties (under Title IX).....	976.21	
Penalties (under Title VIII).....	4,019.84	
Interest (under Title IX).....	404.13	
Interest (under Title VIII).....	1,954.61	
		<hr/>
		\$35,269.85

21. Said Clifford C. Anglim continued in office as such Collector of Internal Revenue to and including May 31, 1942, since which date he has not been, and is not now, in office as such Collector. From June 1, 1942, to December 31, 1942, Richard Nickell was the acting Collector of Internal Revenue for said First District of California, since which date he has not been, and is not now, in office as such acting Collector or as Collector.

22. On August 3, 1943, plaintiff filed with the Collector of Internal Revenue for the First District of California its twelve verified claims for the refund of all of the taxes, penalties and [47] interest so, as aforesaid, paid by it. A separate itemized claim was filed for the tax, penalty and interest so paid under said Title IX for each of the six calen-

dar years 1936 to 1941, both inclusive, and a separate itemized claim was filed, for the tax, penalty and interest so paid under said Title VIII, for each of the six calendar years 1937-1942, both inclusive. Said claims were on printed Form No. 843 prescribed and provided therefor by the Treasury Department of the United States for claims for refund of taxes illegally collected. Each of said claims stated all the matters and things by said Form 843 required to be stated therein, viz: the district in which the returns for taxes were filed; the period for which the tax was paid; the character of the tax; the amount of the tax, and of the penalty and interest; the date of payment; the amounts to be refunded, (which corresponded to the amounts to paid by plaintiff), the time within which the claim could be legally filed expired, and, as the grounds therefor, the following matters, to wit:

“Said *La Societe Francaise de Bienfaisance Mutuelle* is now, and ever since its incorporation in 1856 has been, a corporation organized and operated exclusively for charitable, scientific and educational purposes, to-wit: the treatment of the sick without profit, no part of the net earnings of which enures, or ever has enured, to the benefit of any private shareholder or individuals.

Taxpayer was founded in San Francisco December 28, 1851, as an unincorporated charitable society to treat the sick, and on June 7, 1856 was incorporated under Chapter VIII of the California Corporation Act of 1850, “Relating to Religious and other associations and societies.” Its only ac-

tivity is, and always has been, the treatment of the sick without profit.

Taxpayer has never had any capital stock, and no interest, dividends or other pecuniary distributions, or sick or death benefits, have ever been paid to any one. Any net earnings have always been applied to the improvement of its services. Its affairs are managed by a board of fifteen directors elected annually by the members, and who serve without any fees, salary or compensation whatever. At the time involved, it had, and still has, nearly ten thousand members. Its membership is unlimited, and it has always admitted new members. [48]

Taxpayer was originally founded by donations, and its hospital and plant (on the block of land in San Francisco, California, bounded by Geary Boulevard, Fifth and Sixth Avenues and Anza Street) have mainly been acquired by testamentary and other gifts and the income therefrom. Taxpayer, though in part maintained by members' dues and admission fees, has set up a relief fund to pay the dues of needy widows and orphans and other needy members, for whom it cares without charge.

Taxpayer's only purpose is, and always has been, to treat the sick, and to treat an indefinite and unlimited number thereof, and to give to such persons as adequate and complete treatment as possible, and this not for profit but at the lowest possible charge, consistent with its continued solvency. In addition, taxpayer maintains at its hospital an Old People's Home for elderly members who are admitted thereto, either without charge or on a

nonprofit basis, and gives free emergency treatment (about three hundred cases per year) to deserving cases in its neighborhood and also gives other forms of gratuitous relief. It is a nonprofit agency of the Community Chest of San Francisco.

Taxpayer, accordingly, claims that, as a nonprofit hospital corporation, it is, and always has been, a charitable corporation within the meaning of Sections 1426(b)(8) and 1607(c)(7) of the Federal Internal Revenue Code, and of the corresponding Sections of the Social Security Act.

On July 14, 1937, Charles T. Russell, as Deputy United States Commissioner of Internal Revenue, officially notified taxpayer, in writing, that it was "exempt from payment of the taxes imposed by the Social Security Act, approved August 14, 1935, inasmuch as you come within the exceptions provided in Section 811(b)(8) of Title VIII and Section 907(c)(7) of Title IX."

In addition, each of the claims for the taxes so paid and which had allegedly accrued prior to April 1, 1939, and for the penalties and interest in respect thereof, set forth, as additional grounds therefor, that the same were retroactively and illegally assessed and collected and also the following matters, to-wit:

"Thereafter, on April 3, 1939, by a written communication bearing said date, Victor A. Self, as acting Deputy Commissioner of Internal Revenue, officially notified taxpayer, in writing that it "and its employees are liable for the taxes imposed by Title VIII of the Social Security Act," and, (as

was the fact), if taxpayer was an employer of eight or more individuals, "it was also liable for the tax imposed by Title IX thereof."

Following its receipt of said communication of July 14, 1937, taxpayer had refunded to its employees the amounts theretofore deducted from their wages pursuant to said Title VIII, and thereafter and until the receipt of said communication of April 3, 1939, discontinued any further deductions from their wages." [49]

Each of said claims was signed by plaintiff and verified by the oath of its president. On October 26, 1943, the United States Commissioner of Internal Revenue officially notified plaintiff, in writing, that all of said claims were disallowed on the ground that plaintiff was "an organization organized exclusively for social welfare" and was not a "corporation organized and operated exclusively for charitable purposes."

As a conclusion of law, the court finds:

(a) That plaintiff is now, and ever since August 14, 1935, has been, a charitable corporation within the meaning of Section 811 (b) (8) of Title VIII and of Section 907(c) (7) of Title IX of the Social Security Act approved August 14, 1935, and of the corresponding provisions of the Federal Internal Revenue Code;

(b) That plaintiff is entitled to judgment against defendant for the sum of \$35,269.85 with interest as provided by law at the rate of six per centum on the various portions thereof hereinafter set forth from the following dates, viz:

On the sum of \$17.59 from July 19, 1939;
On the sum of \$21.95 from October 23, 1939;
On the sum of \$19.65 from January 19, 1940;
On the sum of \$19,980.78 from August 14, 1940;
On the sum of \$3.42 from September 10, 1940;
On the sum of \$664.62 from October 21, 1940;
On the sum of \$7,527.81 from October 30, 1940;
On the sum of \$1,395.89 from January 20, 1941;
On the sum of \$670.34 from April 19, 1941;
On the sum of \$673.47 from July 19, 1941;
On the sum of \$661.21 from October 17, 1941;
On the sum of \$680.50 from January 16, 1942;
On the sum of \$805.66 from January 31, 1942;
On the sum of \$710.76 from April 20, 1942; [50]
On the sum of \$716.40 from July 20, 1942;
On the sum of \$719.80 from October 13, 1942;

(c) That plaintiff is entitled to judgment for its costs of suit.

Let judgment in accordance with the foregoing be entered herein.

A. F. ST. SURE

District Judge

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Oct. 13, 1944. [51]

In the District Court of the United States for the
Northern District of California, Southern Division

No. 22,967 S

LA SOCIETE FRANCAISE DE
BIENFAISANCE MUTUELLE,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause having come on regularly for trial upon the 27th day of June, 1944, being a day in the March 1944 term of said court, before the court sitting without a jury, a trial by jury having been waived; Messrs. P. A. Bergerot and A. P. Dessouslavy appearing as attorneys for plaintiff, and Frank J. Hennessy, Esq., United States Attorney, and Miss Esther B. Phillips, Assistant United States Attorney, appearing as attorneys for defendant, and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the court for consideration and decision, and the court, after due deliberation, having filed its opinion and ordered that judgment be entered in favor of plaintiff for Thirty-Five Thousand Two Hundred and Sixty-Nine and 85/100 (35,269.85) dollars with interest, at the rate of six per

centum per annum as provided by law and as hereinafter [52] set forth, on the several portions of said amount, and for costs;

Now, Therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that *La Societe Francaise de Bienfaisance Mutuelle*, a corporation, plaintiff, to have and recover of and from United States of America, defendant, the sum of Thirty-Five Thousand Two Hundred and Sixty-Nine and 85/100 (35,269.85) dollars, with interest as provided by law at the rate of six per centum per annum on the various portions thereof hereinafter set forth from the following dates, viz:

- On the sum of \$17.59 from July 19, 1939;
- On the sum of \$21.95 from October 25, 1939;
- On the sum of \$19.65 from January 19, 1940;
- On the sum of \$19,980.78 from August 14, 1940;
- On the sum of \$3.42 from September 10, 1940;
- On the sum of \$664.62 from October 21, 1940;
- On the sum of \$7,527.81 from October 30, 1940;
- On the sum of \$1,395.89 from January 20, 1941;
- On the sum of \$670.34 from April 19, 1941;
- On the sum of \$673.47 from July 19, 1941;
- On the sum of \$661.21 from October 17, 1941;
- On the sum of \$680.50 from January 16, 1942;
- On the sum of \$805.66 from January 31, 1942;
- On the sum of \$710.76 from April 20, 1942;
- On the sum of \$716.40 from July 20, 1942;
- On the sum of \$719.80 from October 13, 1942;

such interest to be computed by the Commissioner of Internal Revenue, and as provided by law, and its costs herein expended taxed at the sum of \$

Judgment entered October 13, 1944.

C. W. CALBREATH

Clerk

[Endorsed]: Filed Oct. 13, 1944 [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals from the judgment rendered in favor of the plaintiff in the above-entitled case to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 9th, 1945.

FRANK J. HENNESSY,

United States Attorney.

(Acknowledgement of Receipt of Service)

[Endorsed]: Filed Jan. 9, 1945. [54]

[Title of District Court and Cause.]

STIPULATION AND ORDER THEREON EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING CAUSE IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (RULE 73g).

It Is Hereby Stipulated that the time of the above named defendant for filing record on appeal and for docketing the above entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in pursuance of notice of appeal heretofore filed by said defendant, be extended to and including the 9th day of April, 1945.

Dated: February 9, 1945.

P. A. BERGEROT

A. P. DESSOUSLAVY

Attorneys for Plaintiff.

FRANK J. HENNESSY

United States Attorney,

Attorney for Defendant.

[55]

ORDER

On reading the foregoing Stipulation, and on application of Frank J. Hennessy, United States Attorney, attorney for the above named defendant, and good cause appearing therefor;

Now, therefore, It Is Ordered that the time of de-

defendant for filing record on appeal and for docketing the above entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in pursuance of notice of appeal heretofore filed by said defendant on January 9, 1945, be and the same is hereby extended to and including the 9th day of April, 1945.

Dated: February 10, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Feb. 10, 1945. [56]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above entitled Court, and to
Messrs. P. A. Bergerot and A. P. Dessouslavy,
attorneys for plaintiff:

The above named defendant, by its attorney herein, hereby designates for inclusion in the transcript of record upon appeal the complete record and all the proceedings and evidence in the action.

Filed herewith, in conformity with Rule 75(b) of the Federal Rules of Civil Procedure, are two copies of the reporter's transcript of the evidence and proceedings at the trial of said action.

Dated: February 28th, 1945.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

R. B. McMillan, being duly sworn, deposes and says:

That his business address is 422 United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California; that he is a citizen of the United States, and a resident of the City and County of San Francisco; that he is over the age of 18 years, and not a party to the above entitled cause; that on the 28th day of February, 1945, he placed a copy of the within designation of Contents of Record on Appeal in an envelope addressed to Messrs. P. A. Bergerot and A. P. Desouslavy, Attorneys at Law, 110 Sutter Street, San Francisco, California, which is the office [58] address of the attorneys for the above named plaintiff, sealed said envelope, and deposited it in the United States mail at San Francisco, California, with the postage thereon fully prepaid; that there

is delivery service by United States mail at the place so addressed.

R. B. McMILLAN

Subscribed and sworn to before me this 28th day of February, 1945.

[Seal]

WM. J. CROSBY

Deputy Clerk, U. S. District Court No. Dist. of California.

[Endorsed]: Filed Feb. 28, 1945. [59]

In the Southern Division of the United States District Court, in and for the Northern District of California

No. 22,967-S

LA SOCIETE FRANCAISE DE
BIENFAISANCE MUTUELLE,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Tuesday, June 27, 1944

Before: Hon. A. F. St. Sure, Judge.

The Clerk: La Societe Francaise, etc., vs. United States.

Mr. Dessouslavy: Ready.

Miss Phillips: Ready.

Before going ahead with the testimony, I would like to state this: The answer admits, I believe, all of the amounts of payments as alleged in the complaint but differs as to the date of payment. I think that was because perhaps a check [60] would be drawn as of a certain date and then in the account of the bookkeeper there might be a delay in delivery or passing. I think it would simplify matters if I offered the plaintiff a stipulation that the taxes paid to the United States, which are referred to in the complaint, were all paid in the amounts alleged, and that the dates of payment as shown in the Collector's books is four days after the date alleged in the complaint.

Mr. Dessouslavy: In each instance?

Miss Phillips: In each instance. I think that would simplify matters rather than my going through and amending my answer. Is that satisfactory?

Mr. Dessouslavy: Yes, in each case each payment of taxes, principal and interest, alleged in the complaint is stipulated was made, and the only change is that the date of those payments is agreed to be four days later, in each instance, than the date specified in the complaint.

Miss Phillips: Yes. I think that would perhaps simplify it.

Then in paragraph 22 plaintiff alleges the filing of claims for refund and the rejection by the Commissioner. I would like to correct my answer in that. I believe that I can safely admit, and I will

admit, that plaintiff filed claims for refund in the form and in the amounts as required by law on October 26, 1943, the ground of disallowance apparently being that the plaintiff was not a corporation organized to [61] operate exclusively for charitable purposes, but was an organization organized exclusively for social welfare.

Mr. Dessouslavy: That would mean admitting the allegations of paragraph 22 of the complaint.

Miss Phillips: Practically all admitted. I do not know whether you have alleged anything else in that paragraph, but I am stipulating that plaintiff filed claims for refund in the form and amounts required by law, and that they were rejected on the ground alleged.

Mr. Dessouslavy: Very well. We will call our first witness, Mr. Pomme.

EDWARD B. POMME,

called as a witness by the plaintiff; sworn

The Clerk: Q. Will you state your name to the Court, please?

A. Edward B. Pomme.

Mr. Dessouslavy: Q. Where do you live, Mr. Pomme?

A. 642 Fifth Avenue, San Francisco.

Q. What is your occupation?

A. I am the bookkeeper of the La Societe Francaise De Bienfaisance Mutuelle.

Q. Are you also an accountant?

A. Yes.

(Testimony of Edward B. Pomme.)

Q. Are you the accountant for the plaintiff, the French Hospital? A. Yes.

Q. How long have you held that position?

A. 27 years.

Q. Are all of the books and accounts of the plaintiff under [62] your direction and supervision? A. Yes.

Q. And have been for many years?

A. Yes.

Mr. Dessouslavy: There is not much controversy on the facts, and if there is no objection I will ask leading questions.

Miss Phillips: Yes, I think that is all right. If I find they are too leading then I will object.

Mr. Dessouslavy: Q. Does the plaintiff maintain and operate a hospital known as the French Hospital on the block of land bounded by Geary Boulevard, Anza Street, and Fifth and Sixth Avenues? A. Yes.

Q. That is a general hospital, is it not?

A. Yes.

Q. Open to the public at large? A. Yes.

Q. Does the hospital make any distinction as to race, color or creed in making application for treatment? A. No.

Q. Does it take smallpox cases? A. No.

Q. Or delirium tremens cases? A. No.

Q. Or insanity cases? A. No.

Q. With those exceptions does it treat all?

A. Yes.

(Testimony of Edward B. Pomme.)

Q. Is it and has it been for a long time approved by the American Medical Association? A. Yes.

Q. And also the American College of Surgeons?

A. Yes.

Q. It is approved by them as a class A hospital?

A. Yes.

Q. Has the hospital a number of departments?

A. Yes.

Q. Has it a maternity department?

A. Yes.

Q. A department of pathology? A. Yes.

[63]

Q. Equipped for all tests? A. Yes.

Q. Bacteriological? A. Yes.

Q. Chemical? A. Yes.

Q. Serological? A. Yes.

Q. Basal metabolism? A. Yes.

Q. Tissue examinations? A. Yes.

Q. Is there a department of radiology?

A. Yes.

Q. Is the hospital equipped for deep therapy procedures? A. Yes.

Q. There is a general executive staff at the hospital, is there not? A. Yes.

Q. That is, consulting staff, house staff, and visiting staff? A. Yes.

Q. How many doctors are there on the executive staff? A. Twenty-nine doctors.

Q. Who pays them? A. The society.

Q. The plaintiff? A. Yes.

(Testimony of Edward B. Pomme.)

Q. How many doctors on the consulting staff?

A. Four of them.

Q. They are not paid? A. No.

Q. How many doctors on the house staff?

A. Five doctors including internes who are paid.

Q. How many doctors on the visiting staff?

A. I think there are about 250 at the present time.

Q. The number of doctors on the house staff is rather depressed at the present time on account of the war, is it not? [64]

A. Yes.

Q. But normally and before the war how many resident doctors were there in the hospital?

A. There were seven resident internes and three resident doctors.

Q. So before that there were more on the house staff? A. Yes.

Q. When you speak of the visiting staff you simply mean doctors who attend patients in the hospital, is that so? A. Yes.

Q. Now, in what year was the hospital building on Geary street started, if you know?

A. 1895.

Q. How many buildings are there now on that block? A. There are eleven buildings.

Q. Are they one—or two stories?

A. Two stories.

Q. Are they interconnected to any extent?

A. Yes, nine of them are interconnected by hallways.

(Testimony of Edward B. Pomme.)

Q. Covered passages? A. Yes.

Q. That is the second floor?

A. The first and second floors.

Q. Are plaintiff's affairs managed by a board of directors? A. Yes.

Q. How many directors are there?

A. Fifteen.

Q. How often are they elected?

A. Twice a month.

Q. I mean how often is the board of directors elected?

A. They are elected once a year.

Q. The plaintiff carries on its business at the French Hospital there on Geary street, does it not?

A. Yes.

Q. It has no other office? A. No. [65]

Q. Now, will you briefly describe what plaintiff's activities are?

A. Well, the activities consist in taking care of the membership—taking care of the membership and operating a hospital.

Q. And furnishing medical and surgical service?

A. Yes.

Q. Does it also have a nurses' training school?

A. Yes. There is also an old people's home.

Q. On November 23, 1943, how many members did plaintiff have—in the month of November of last year.

A. Well, I am not sure about the figure, it must have been around 9500.

Q. About 9500? A. Yes.

(Testimony of Edward B. Pomme.)

Q. Does those figures that you have mentioned include life members? A. Yes.

Q. Are the rights of life members and other members the same?

A. They are exactly the same.

Q. What monthly dues do others than life members pay?

A. They pay \$1.75 a month, and that amount is reduced to \$1 for children under fifteen whose father or mother are members.

Q. How long has the \$1.75 per month been in effect? A. Since 1938.

Q. Before 1938 how much were they?

A. \$1.50.

Q. Before they were \$1.50 how much were they?

A. \$1.25.

Q. And before that at one time the rates were \$1 a month? A. Yes.

Q. For an adult member? A. Yes. [66]

Q. Is it because of increasing costs that you have had to increase the membership dues?

A. Yes.

Q. Now, how much do the minors pay?

A. The minors under fifteen pay \$1 a month.

Q. How long has the rate for the minors been \$1 a month? A. Since 1938 also.

Q. Before that how much?

A. It was 75 cents.

Q. And before that was it 50 cents?

A. 50 cents.

Q. Do you remember when it was they changed from 50 cents to 75 cents for minors?

(Testimony of Edward B. Pomme.)

A. I do not remember the exact date.

Q. Has the plaintiff ever had any capital stock?

A. No.

Q. Has it any shareholders? A. No.

Q. Has plaintiff ever paid any dividends to its members, cash or otherwise? A. No.

Q. Has it paid any interest? A. No.

Q. Has it paid any benefits in money?

A. No.

Q. Has it ever paid them any dividend or benefit in money? A. No.

Q. The plaintiff has a president, two vice-presidents, and two secretaries, has it not?

A. That is correct.

Q. Do any of them receive any compensation or salary? A. No compensation, whatsoever.

Q. Has any of them ever received any compensation or salary? A. Never

Q. Does the board of directors receive any compensation? A. No. [67]

Q. How many times a month do the directors meet?

A. Twice a month, on the 2nd and 4th Monday of every month.

Q. How many beds are there in the plaintiff's French Hospital? A. 225.

Q. How many private rooms?

A. I am not sure about the number.

Q. Well, approximately, would it be about 75?

A. About 75.

Q. The rest are in wards? A. Yes.

(Testimony of Edward B. Pomme.)

Q. Will you explain at length, Mr. Pomme, the benefits to which members are entitled to receive without any charge?

A. Well, they are entitled to consultation from the doctors of the society, and they are entitled to free consultation by the doctors who are on the staff of the society.

Q. That consultation is either at the hospital or a doctor's office? A. Yes.

Q. Or else the doctors calls at the member's home? A. Yes.

Q. His consultation is free at the hospital, at the office of the staff doctor, or at the member's home? A. Yes.

Q. That is the out patient's benefit?

A. Yes.

Q. Now, how many doctors are available at the hospital for the purpose of consultation?

A. Well, 25.

Q. Any one of those doctors can be consulted by a member? A. Yes.

Q. Are there any in Oakland?

A. Two doctors in Oakland.

Q. And in San Jose?

A. There is none at the present time.

Q. Are there some visiting doctors that members can call upon? [68] A. Yes.

Q. If a member falls sick and requires hospitalization all of this service is rendered without any charge at all? A. Yes.

(Testimony of Edward B. Pomme.)

Q. In the case of a man falling sick and requiring medical and surgical treatment at the hospital, what does he get without pay?

A. Well, he gets free medicine, free operating room service, and laboratory tests.

Q. He gets the operation, too, doesn't he?

A. The operation.

Q. He gets his drugs and dressings during the hospitalization period without charge?

A. Yes.

Q. Do the members hospitalized in the wards pay any charge?

A. Yes, they do.

Q. How much?

A. That is 10 per cent of the price charged to outside patients.

Q. Is it not a fact that members in wards pay 50 cents per day?

A. That is about 10 per cent of the price charged to outside patients.

Q. But there is a flat charge of 50 cents a day?

A. Yes.

Q. A member who takes a private room, what does he pay a day?

A. About 50 per cent of that paid by outside patients.

Q. Is there a minimum daily charge for a private room for members?

A. \$2 a day.

Q. Now, a memembr who is hospitalized can remain in the hospital and receive this free treatment for how long?

A. For six months. [69]

(Testimony of Edward B. Pomme.)

Q. Does that mean six months in any one year?

A. In any one year.

Q. For example, if a member patient came to the hospital on July 1, he stays there until December 31, paying nothing, doesn't he? A. Yes.

Q. And then from January 1 to June 30 he would pay the ordinary rate? A. I think so.

Q. He would pay somewhat in addition. I think that is in the bylaws, I will get that. But commencing again on the 1st of July of next year he could come in the hospital free for another six months, can he not? A. Yes.

Q. Now, in the case of tuberculosis, is there any six months limitation?

A. There is no time limit in those cases.

Q. A tuberculosis case can stay for months or years without any payment? A. Yes.

Q. I think you have stated that during the period of hospitalization the members pay nothing for drugs and dressings? A. No, they do not.

Q. Is there any exception about that with regard to very special drugs for hospitalized patients?

A. No, except for outside patients, I mean outside members who use the pharmacy, they have to pay a certain price for prescriptions.

Q. It is also true, is it not, that in the case of members who are sick and in need, indigent members, they are retained in the hospital indefinitely and without regard to the six [70] months limitation? A. In some cases.

(Testimony of Edward B. Pomme.)

Q. That is in the discretion of the board of directors, is it not? A. Yes.

Q. Are there any services or medicines furnished to members at a discount?

A. Maternity service is given to mothers at a discount.

Q. When the mother is a member she gets a discount from the prevailing rates of charge?

A. Well, I am not familiar with that. I know there is a certain discount.

Q. I believe it is 25 per cent. Will you accept that, Miss Phillips?

Miss Phillips: Yes, a discount of 25 per cent to the member mothers.

Mr. Dessouslavy: Q. Do out patients, as you have described them a moment ago, pay any fee for drugs? A. Yes.

Q. How is that computed?

A. Well, there is a fee on drugs and dressings of 10 cents or 20 cents, regardless of cost.

Q. In the case of such matters as diatheramy, hydrotherapy, physiotherapy, metabolism examinations, electrocardiograms, is there any discount?

A. There is a charge to the members of 50 cents for each.

Q. I have here a statement, Mr. Pomme, headed, "Daily average number of hospitalized patients," and "Annual calls and consultations in outpatient department," and I will ask you to look at that and tell me if that is correct.

A. Yes, it is correct. [71]

(Testimony of Edward B. Pomme.)

Mr. Dessouslavy: I offer this in evidence, if your Honor please, as Plaintiff's Exhibit No. 1.

Miss Phillips: No objection.

The Court: It may be marked.

(The document was marked "Plaintiff's Exhibit 1" in evidence.)

The Court: Are you going to read that into the record?

Mr. Dessouslavy: I do not think it is necessary.

The Court: I think it might as well be read into the record.

Mr. Dessouslavy: This is a statement for the eight fiscal years of the plaintiff commencing March 1, 1936, and it shows for the year ending February 28, 1937 a daily average of 183.63 patients, and then reading in chronological order, 1938, 187.10; 1939, 177.97; 1940, 174.31; 1941, 158.98; 1942, 162.08; 1943, 137.45; and 1944, 189.71. That is the daily average number of hospitalized patients.

The annual calls and consultations in outpatient department for the year ending February 28, 1937 was 35,502; 1938, 33,792; 1939, 33,299; 1940, 38,933; 1941, 35,933; 1942, 36,608; 1943, 29,481; and 1944, 26,329.

Q. Does the plaintiff, in its hospital, maintain what is called an old people's home? A. Yes.

Q. That is for the care of aged and infirm members? A. Yes.

Q. Is there a separate building for them?

A. Yes. [72]

(Testimony of Edward B. Pomme.)

Q. With accommodations for how many people?

A. Fifteen people.

Q. Is that building pretty well full?

A. It is always full.

Q. Do you also keep some old members at the main hospital buildings? A. Yes.

Q. About how many of those old members are there, altogether?

A. There are fourteen at the present time, as regular old people, I mean old people, and there are about 12 to 15 old people that are sick and stay in the hospital just because they are allowed to stay there.

Q. Are you usually present at meetings of the board of directors? A. Yes.

Q. Have you at times listened to their discussion when some member's application as a life boarder was received. A. Yes.

Q. In some cases under the bylaws the board of directors permits that? A. Yes.

Q. In those discussions, has the admission of those applicants been based upon a monetary or financial consideration, or upon general human considerations?

A. Just on human considerations.

Q. I mean those elderly people, when their applications were granted, were not taken on some other basis? A. No, they were not.

Q. You are quite sure of that?

A. Yes, absolutely.

(Testimony of Edward B. Pomme.)

Q. Just to make the thing clear, these old members are referred to as life boarders? A. Yes.

Q. When you say life boarders, you do not mean life members, do [73] you, who pay their fees in advance? A. No.

The Court: What does a life membership cost?

Mr. Dissouslavy: It has varied. It originally was \$100 for many years, and has increased to \$1500.

The Court: How many life members are there now?

A. 919, the last count.

Mr. Dissouslavy: Q. If a member is in the arme forces of the United States he pays no dues?

A. No.

Q. Dues are waived for members of the armed forces? A. Yes.

Q. If a minor under 17 loses his parents the dues are waived until he is 17? A. Yes.

Q. A student nurse who is a member pays no dues? A. No, he does not pay any dues.

Q. There is a society in San Francisco known as the French Ladies Benevolent Society?

A. Yes.

Q. And the hospital places free beds at the disposition of that French society? A. Yes.

Q. Those two free beds are also entitled to free medical service and medicines?

A. That is right.

Q. Geary Boulevard is a main traffic artery; automobiles pass the hospital on Geary Boulevard?

(Testimony of Edward B. Pomme.)

A. Yes.

Q. Does the hospital give free emergency treatment to deserving cases in that neighborhood?

A. Yes.

Q. It makes no charge for that?

A. It makes no charge.

Q. About how many such cases would there be in the court of a [17] month? A. About 18.

Q. Does the hospital repatriate poor members to the country of their origin? A. Yes.

Q. If an indigent member dies at the hospital the hospital pays for his funeral, doesn't it?

A. Yes.

Q. Does the hospital maintain a relief fund?

A. Yes.

Q. About how much money is there in that fund?

A. About \$12,000 at the present time.

Q. What is the fund used for?

A. To pay the dues of indigent members and members who can't afford to pay monthly dues, and also to cover some bills that they have made at the hospital that they are unable to pay.

Q. Suppose an indigent person needed a private room, for example, would he get that private room out of that fund? A. Yes, in some cases.

Q. That is in deserving cases? A. Yes.

Q. When was that relief fund first set up, do you know? A. In 1905.

Q. And out of that fund dues of orphans and poor widows are paid? A. Yes.

(Testimony of Edward B. Pomme.)

Q. In other words, a needy member is not turned away because he cannot pay his dues?

A. He is never turned away.

Q. That is a very definite fact? A. Yes.

Q. If he is a member and in need he is cared for?

A. Yes.

Q. Before this war about how many nurses would there usually be in the nurses training school?

A. There were about 75. [75]

Q. Taking a course of training? A. Yes.

Q. Is there a building especially devoted to them? A. Yes.

Q. That is on the corner of Anza and Sixth Avenue? A. Yes.

Q. A four-story and basement building?

A. Yes.

Q. That is entirely for their housing accommodations, is it not? A. Yes.

Q. Now, in a year when the receipts are more than the disbursements, what is done with the excess? A. Well, it is put aside as a reserve.

Q. I show you a statement, Mr. Pomme, marked, "Surplus account." Is that a correct statement of the surplus account of plaintiff on March 1, 1936 to February 29, 1944? A. Yes, it is.

Mr. Dessouslavy: We offer this in evidence as our next exhibit in order.

The Court: Admitted.

(The document showing surplus account was marked Plaintiff's Exhibit 2.)

Mr. Dessouslavy: If I may read it, your Honor,

(Testimony of Edward B. Pomme.)

it shows briefly this, that the surplus on March 1, 1936, was roughly \$123,000. There was a net adjustment of reserve for life members of \$13,000, making a total of \$136,325. From that total there is to be deducted an excess on disbursements over receipts for this period of \$35,283, a net write-off in value of securities of \$27,805; members old accounts charged off, \$2344; miscellaneous adjustments, \$249, with the result that the [76] surplus on February 29, 1944, was \$70,642.70, or a decrease in surplus during that eight-year period of \$65,682.95.

Q. Mr. Pomme, what is the source of plaintiff's receipts?

A. The sources of receipts are monthly dues, admission fees, and the profits out of the hospital's operations.

Q. I am talking about gross receipts. How about membership dues? A. Yes.

Q. Life membership fees. A. Yes.

Q. How about special admission fees of life boarders. A. Yes.

Q. How about income from investments.

A. Yes.

Q. How about also donations and legacies.

A. Yes.

Q. And there are also receipts from non-member patients, are there not? A. Yes.

Q. Since 1851, 92 years ago, when the hospital was founded, the hospital from time to time has received gifts, donations, and bequests, has it not?

A. Yes.

(Testimony of Edward B. Pomme.)

Q. Have you compiled from the books a list of those donations and bequests? A. Yes.

Q. And that has been carried up to a few weeks ago? A. Yes, \$362,000.

Mr. Dessouslavy: We offer in evidence as our exhibit next in order the paper entitled, "Donations and Bequests received from 1851 to 1940," and shows the donations and bequests received during that period of \$362,822.63.

The Court: It may be admitted. [77]

(The document was marked Plaintiff's Exhibit 3 in evidence.)

Mr. Dessouslavy: Q. Now, that statement is exclusive of such items as surgical instruments, books, and items of personal property? A. Yes.

Q. It does not include those? A. No.

Q. The nurses home is a building size 54 feet by 103 feet, is it not? A. Yes.

Q. Four-story and basement building?

A. Yes.

Q. With 80 rooms? A. 80 rooms.

Q. It has a library and laundry, reception room, and social hall, is that correct? A. Yes.

Q. That home is used solely for nurses, is it not?

A. Yes.

Q. There is also a nurses' dietary school, is there not? A. Yes. [78]

Q. I will come back to that later. I will show a paper, Mr. Pomme, headed "Improvements to Buildings and Equipment." You are familiar with that statement? A. Yes.

Q. And it is correct? A. Yes, sir.

(Testimony of Edward B. Pomme.)

Q. It covers eight years commencing March 1, 1936? A. Yes.

Q. It has three columns; the first is headed "Permanent Improvements (Capitalized)"; the second is headed "Semi-Permanent Improvements (Not capitalized)," and the third is headed "Current Maintenance." What do you mean by "Permanent Improvements"?

A. Well, they are improvements whose cost is added to the value of the buildings or the value of the equipment.

Q. You simply mark up your assets by that amount? A. Yes.

Q. Your second account is headed "Semi-Permanent Improvements." What do those consist of?

A. They consist of some improvements whose life, I would say, is not such as to be taken as permanent Improvements (Capitalized)"; the second have.

Q. You mean they do not permanently increase the value of the buildings?

A. They do not; their life is too short.

Q. In addition to that you have here on this exhibit "Current Maintenance," which runs about \$5000 a year?

A. Yes, that is the cost of current maintenance.

Miss Phillips: What does the "current maintenance" mean?

The Witness: That is the expense that happens as we go along from year to year.

Miss Phillips: You mean repairs? [79]

(Testimony of Edward B. Pomme.)

The Witness: Minor repairs and things of that type.

Mr. Dessouslavy: Q. The permanent improvements, semi-permanent improvements, and current maintenance in that eight-year period total about \$125,000? A. Yes.

Mr. Dessouslavy: I offer that as our exhibit next in order.

The Court: Is that the total of the three items you mentioned?

Mr. Dessouslavy: Yes.

The Court: That will be the total of the three items?

Mr. Dessouslavy: Yes.

The Court: It may be admitted.

(The paper was marked Plaintiff's Exhibit 4 in evidence.)

Mr. Dessouslavy: Q. Mr. Pomme, have you a statement there—this is not directly pertinent; you can object if you want to—in the seven fiscal years before March 1, 1936, do you know how much you spent for permanent improvements at the hospital?

A. I have not got the statement with me.

Q. If I showed you the figures would you recognize them? A. I think so.

Mr. Dessouslavy: Have you any objection?

Miss Phillips: No objection.

Mr. Dessouslavy: Q. Do you recognize these figures? A. Yes.

Q. I will ask you the question, In the seven fiscal

(Testimony of Edward B. Pomme.)

years before March 1, 1936 how much did you pay out for permanent improvements? [80]

A. Well, I don't remember the amount.

The Court: If it shows, read it.

Mr. Dessouslavy: \$62,395.59.

Q. That is about right? A. Yes.

Q. Is there any reserve carried for buildings?

A. Well, there is no reserve in the sense of building reserve, but there are some funds set aside for that purpose.

Q. I show you, Mr. Pomme, Plaintiff's Annual Report for the fiscal year ending February 29, 1944, page 9. There is the building reserve there, isn't there? A. Yes.

Q. That building reserve is made up of two items, one the benefactors' fund and the other name is what? A. Depreciation fund.

Q. How much was there in the depreciation fund on February 29 of this year?

A. There was \$144,836.89.

Q. How much was there in the benefactors' fund? A. \$76,783.87.

Q. The benefactors' fund is made up of gifts and donations? A. Yes.

Q. The depreciation fund is made up of charges against and deductions from the value of the buildings and a corresponding credit to the depreciation fund, is it not? A. Yes.

Q. Is that correct? Have I got that straight?

A. Yes.

(Testimony of Edward B. Pomme.)

Q. By the way, do you know what the hospital paid for its Geary Street block when it bought it about 1890? [81] A. \$47,000.

Q. It is now carried on the books at \$107,000?

A. Yes.

Q. For the record, that is just an estimate, is it not? A. Yes, I think so.

Q. The Bryant Street property was sold at a large profit in 1906, was it not?

A. It was sold for \$110,000.

Q. By the way, are there in the hospital any plates showing the names of donors? A. Yes.

Q. The bylaws provide, I believe, that all gifts and donations shall be reserved for permanent improvements? A. Yes.

Q. And not used to pay current expenses?

A. Yes.

Q. What has been the hospital's average income from interest, rents, and dividends in the past thirty years?

A. Well, around \$7,000—\$7,000 to \$10,000.

Q. What proportion of that would you say represented income from gifts and donations?

A. Practically all.

Q. This total of 225 beds, does that include those for internes, resident staff or employees?

A. No.

Q. Are the life boarders included among the 225?

A. Yes.

The Court: What is the income such as rent, dividends?

(Testimony of Edward B. Pomme.)

The Witness: From real estate.

Mr. Dessouslavy: From time to time the hospital has owned real estate. I think it has sold all of the real estate at this time. At this time they do not own any real estate other than the Geary Street property, do they? A. No. [82]

Q. But in the past the plaintiff did own property? A. Yes.

Q. It owned property on Jackson Street which it sold off? A. On Pine Street.

Q. That was sold? A. That was sold.

The Court: This is income from gifts?

Mr. Dessouslavy: That is securities from which the hospital received income, originating mostly in gifts.

The Court: At this time we will interrupt the trial for a few minutes.

(Recess.)

Mr. Dessouslavy: If your Honor please, at this time we offer in evidence the bylaws of the plaintiff as they were in 1931. There have been a number of amendments beginning with 1936, but I am offering the amendments since that date separately, and for convenience of reference I am offering a printed copy of the bylaws as they were in 1931.

Miss Phillips: No objection.

(The bylaws were marked Plaintiff's Exhibit 5 in evidence.)

(Testimony of Edward B. Pomme.)

PLAINTIFF'S EXHIBIT No. 5

Part 1

STATUTS

By-Laws

of

La Societe Francaise

de Bienfaisance

Mutuelle

(A Non-Profit Organization)

Owning and Operating

The

FRENCH HOSPITAL

(Conducted as a Non-Profit Institution)

Founded 1851

Incorporated 1856

San Francisco, California

As amended from time to time since incorporation and last amended by unanimous decision of the Board of Directors, March 31, 1941, upon recommendation by the Members of Annual Meeting, March 23, 1941, effective March 31, 1941.

Introduction

The French Mutual Benevolent Society was founded December 28, 1851 by a group of French emigrants to aid the needy and sick among the large group of French who had come to California

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

during the gold excitement and away from the troubled conditions in France. The French element was the most numerous among the population of San Francisco in the early fifties. On May 24, 1856 this Society was incorporated under the name of French Mutual Benevolent Society (*Societe Francaise de Bienfaisance Mutuelle*) with dues paying members but did not confine itself to its mutual name, but continued to exercise the charitable work for others than its members, as it had done in the past.

For years it has held two free beds open to non-members recommended by other benevolent institutions. A hospital was built on Bryant Street, San Francisco, in 1858 and a new hospital was built in 1894 in the entire block 240' by 600' bounded by Geary Boulevard (then Point Lobos Avenue), Anza Street, 5th and 6th Avenues, San Francisco.

This hospital was one of the first, if not the first, to institute a student body of nurses. Later a home for the student body was built on the north-east corner of Anza and 6th Avenue of 80 rooms, meeting hall and recreation rooms, with furnishings at a cost of \$120,000.00.

Instructors for the students are engaged at an approximate salary list of \$7,500.00. This is for graduate instructors, without taking into consideration lectures given by paid members of the Medical Staff.

Orphaned children of members up to 17 years of

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

age are furnished free medical treatment and hospitalization when needed.

The hospital has a body of seven interns finishing their education, receiving board, lodging and not less than \$25.00 of monthly expense money. Three resident house doctors are kept at the hospital.

During the fire and earthquake of 1906, the hospital took care of many refugees. During the world war, many of the soldiers stationed near First Avenue and Geary Boulevard were taken care of at the Hospital.

With its over 9,000 members, the Society has saved thousands of dollars to the City and County of San Francisco through its care of those requiring medical attention and unable to pay for regular hospital charges.

BY-LAWS

Of The French Mutual Benevolent Society

Article I.

§ 1. Through the act of incorporation dated May 24, 1856, the Society founded on December 28, 1851, thereafter exists under the name of: French Mutual Benevolent Society.

§ 2. The headquarters of the Society are located in the City of San Francisco, California.

§ 3. As far as practicable, the French language is used in members' meetings, at the Directors' meetings, as well as in the records of the Society.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article II.

Purpose of the Society.

§ 1. The Society is founded for the following purposes:

1. To provide medical assistance and hospitalization, in case of sickness or accident, preferably to people of French birth, or descendants of people of French birth, or persons speaking French.

2. To maintain and operate a Hospital, open to the public, and a clinic, thereby giving to the sick the benefit of up to date, modern, scientific care and to promote, as far as possible, for the benefit of Humanity, the study of sickness, of its treatment and of its prevention.

- § 2. It may maintain and operate a School of Nursing and an Old People's Home and engage within its available means in any other activity of a charitable, educational or scientific character.

- § 3. Neither political nor religious questions can ever be considered in its midst.

Article III

Means of Operation.

§ 1. The funds necessary to attain the purpose of the Society are acquired as follows:

1. By admission fees, monthly dues, life membership admissions of members.

2. By amounts paid by paying patients.

3. By miscellaneous incomes from the Hospital.

4. By revenues derived from investment of available funds.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

5. By donations legacies, endowments or subscriptions.

§ 2. The funds of the Society shall be used exclusively for the purpose specified in its By-Laws and no salary or bonus or compensation shall be paid to any member, as a member, or to any member of the Board of Directors, President, Secretary or any other officer of the Society. No profits, accumulations or surplus shall be distributed, or given as dividends, or enure to the benefit of any of the members of the Society or of any other private individual.

§ 3. When a person has been regularly admitted as a member, the amounts paid for his admission, his dues or his life membership become thereby the immediate and exclusive property of the Society to be used for its general humanitarian purposes, and the member relinquishes his rights to all or any part of said amounts.

Article IV

Admission of Members.

§ 1. Any person of French birth, or descendant of French or speaking French, sound in mind and in body, and less than 50 years old, can be admitted as a member of the Society.

All persons admitted as members must abide by the present By-Laws or any future amendments thereto.

§ 2. The age limit is retarded until 55 years of age for any person of French nationality who en-

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

rolls during the first year of his residence in California.

§ 3. The number of members is unlimited.

§ 4. To become a member, the applicant must present himself at the Hospital between the hours of 10 and 12 a. m., or 1 to 4 p. m., sign an application blank furnished by the office, and be examined by the Resident Physician or an Intern. If deemed necessary the application may be referred to a specialist of the Society. The application is then forwarded to the Committee for action thereon.

§ 5. The admission charges are as follows: Children under 15 years, \$25.00; applicants from 15 to 30 years, \$40.00. Applicants over 30 years old must pay an additional charge of \$3.00 per additional year; after the fortieth year, the extra charge is \$4.00 per year.

Admission fees are payable in advance and if the application is not accepted, they shall be refunded. However, upon demand and with the authorization of the Board of Directors, admission fees can be paid in three consecutive installments.

§ 6. Any person, of whatever nationality, may be elected honorary member of the Society, at a General Meeting, by a majority vote.

§ 7. Any person complying with the conditions required by the By-Laws to become a member, may, by paying a sum of \$1,500.00, become a life member, and thus acquire the full membership without ever having to pay monthly dues.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 8. Any member having paid monthly dues at the rate of an adult during 15 consecutive years, may acquire the title of Life Member by paying the sum of \$1,000.00.

Article V

Dues.

§ 1. Dues are \$1.75 per month for any member past 15 years of age and for any child whose parents are not members. They are reduced to \$1.00 per month for children under 15 years whose father or mother is a member.

§ 2. These children, should they become orphans, or be abandoned by their parents, are exempt from the payment of any dues until the age of 17 years, and enjoy gratuitously the same privileges all other members do.

§ 3. Dues are payable from the first of the month of which a member is admitted, thereafter on the first of each month.

§ 4. The members residing in this City, pay their dues to the Collector or at the Hospital. Those residing in other localities may pay the corresponding member for their district. Payments may be made by money-order or by check.

Article VI

Privileges of Members.

§ 1. By the fact of his membership, a member is entitled gratuitously to all the services of the Society, subject however to all conditions, restrictions and exceptions prescribed in these By-Laws.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 2. The members acquire their privileges three months after their first dues and lose them when allowing three months to elapse without paying any dues. They will reacquire their privileges 30 days after the payment of these arrears. The privileges can become operative before the three months lapse in case of a fracture or other unforeseen accident duly certified to by a doctor of the Society.

§ 3. Any member six months in arrears in the payment of his dues is hereby stricken from the rolls of the Society, and cannot be re-admitted except as a new member.

§ 4. Any member more than six months in arrears in the payment of his dues, who is over 50 years of age, and having been affiliated for 10 consecutive years, may obtain his former privileges by paying his arrearage, and presenting a health certificate duly signed by a doctor of the Society and consented to by the Board of Directors.

§ 5. Any member going to France for his service in the Army or joining the American Forces after having notified the Board of his departure may be reinstated at his return and will be released from the payment of arrears or of initiation fees, provided his request for reinstatement be filed during the six months following his discharge.

§ 6. Any member joining the Society's Training School for Nurses, shall be exempted from the payment of her dues during the period of her training.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article VII

General Meetings.

§ 1. The members entitled to vote meet at a General Preliminary Meeting the second Sunday in March of each year. They form a bureau composed of a President, a Vice-President and a Secretary.

§ 2. All propositions relating to the administration of the Society must be introduced at this meeting where they are discussed and voted upon. They are then studied by the Board, which has them published during the week preceding the General Meeting, rendering at the same time an opinion upon each one.

§ 3. The General Annual Meeting of the members takes place under the direction of the Board, the fourth Sunday in March of each year. The annual report is acted upon, as well as all the propositions introduced at the Preliminary Meeting.

§ 4. The Board has the right of calling a General Extraordinary Meeting to discuss a question of general interest, but it shall call one in the following case: Upon presentation of a request containing a specific reason, signed by at least seven per cent of voting members.

§ 5. The General Meetings can only be held on Sunday, and shall be called through due notice in the newspapers at least one week in advance. In case of an Extraordinary Meeting the notice shall contain the cause of the meeting. No question foreign to this cause can then be discussed.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 6. The quorum required for a General Meeting shall consist of two hundred electors.

Article VIII

Elections.

§ 1. The elections for members of the Board of Directors of the Society take place on the Sunday following the General Annual Meeting.

§ 2. Members without distinction of sex, above the age of 15 years, are entitled to vote. They must have with them their membership card in good standing and an electoral card in order to vote.

§ 3. To be eligible as a director one must: First, be an elector, at least 21 years of age, without distinction as to sex; second, have been a member for at least one year; third, be French born or son of a Frenchman, or son of a Frenchman naturalized.

No member, directly or indirectly in the employ of a firm or company having commercial dealings with the Hospital, may be candidate to the Board of Directors. Any member of the Board who subsequently becomes involved directly or indirectly in a commercial transaction with the Hospital shall be thereby disqualified from office.

Exception shall be made in the case where some of the articles or services necessary to the Hospital cannot be obtained elsewhere or are needed in an emergency.

§ 4. All elections are by secret ballot and on a plurality of the votes. They are presided over by a

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

bureau composed of a president, a secretary, two judges of election and at least four tellers. This bureau may be nominated at the Preliminary Meeting, but in this case to be legally constituted it shall be ratified by the General Meeting.

§ 5. A candidacy to the office of Director must be presented by a member in good standing at the Preparatory Meeting or to the Board of Directors during the two weeks following. The Board must prepare a list of the candidates who meet the requirements prescribed by the By-Laws. The list closes at 5 p. m. on the Saturday preceding the General Meeting and shall be published from that day on in one or more French newspapers until the following Sunday, the day of the elections.

§ 6. The Board shall have printed two kinds of ballots, one on white paper and the other on colored paper. The white shall be placed at the disposal of the members three days before the elections; and the colored, stamped with the seal of the Society—the only ones to be used as ballots—shall be given out, upon presentation of a voting card, only on the election day, in the voting hall, where shall be arranged beforehand a special installation so that each voter may prepare his ballot in secret. The ballots shall contain the names of the candidates in alphabetical order and be similar to the official ballots used in the municipal elections of this City.

Each voter shall sign his name and address on a register appropriated in conformity with the uses

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

established for State and Municipal elections of the State of California.

No partial list of candidates, nor any electoral list different from those required by the By-Laws shall be introduced, distributed, exhibited or displayed in the Assembly or Voting Halls nor in the halls or vestibules communicating with the Assembly of Voting Hall.

Any member violating this regulation may be subject to ejection.

§ 7. After each name there is a square and the voter shall make a cross in the square placed on the right of the name of the candidate for whom he wishes to vote. Any irregular ballot—that is one containing more names voted than there are candidates to be elected—shall be declared, when the ballots are being counted, null and void for the part in which such irregularity appears.

§ 8. As soon as the results are determined the president of the elections shall announce them; they shall then be entered in the report which, after having been signed by the members of the buerau of elections, is given to the president of the Society who orders its publication.

§ 9. Any member who shall vote, or try to vote more than once at an election or in any secret vote, shall be expelled from the Society.

Any person voting under a name other than his own, shall be expelled from the Society, and if not a member shall at no time be admitted.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article IX

Administration.

§ 1. The Society is governed by a Board of Directors of 15 members elected in conformity with Art. VII.

§ 2. In the week following the elections, the outgoing Board shall install the new Board and transfer at this meeting all the documents and certificates of stock belonging to the Society entrusted in its care, the inventory of which shall be spread out on the minutes.

§ 3. The directors form their bureau by electing by an absolute majority, a president, two vice-presidents, a financial secretary and a recording secretary.

§ 4. The Board meets in regular meeting at least twice a month on such days as it determines.

§ 5. The President calls the Board in extraordinary meeting whenever he deems it necessary, or when a request for a call meeting is addressed to him by five Directors.

§ 6. The President, or one of the Vice-Presidents, or in their absence a member chosen by its colleagues present, presides over the meetings of the Board.

§ 7. The Board can hold a meeting only if eight members at least are present, and all motions shall be carried by a majority of those voting. The roll call on a motion takes place when it is requested by two members of the Board, and the vote of each

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

member present shall be recorded in the minutes; likewise a record shall be made of a member abstaining from the vote.

§ 8. After a motion has carried, any request for reconsideration of the vote shall be presented at the same meeting by one of the members having voted with the majority; but the reconsideration shall only take place at the following meeting.

§ 9. The minutes of each meeting shall be drawn up by the Secretary, approved by the Board and signed by the President and Secretary.

§ 10. The Board appoints all the employees of the Society, fixes their salaries and the amount of bonds for those who incur responsibilities such as the Superintendent, the Collector, the Accountant, etc. These bonds shall be provided by a society legally organized and acceptable to the Board.

§ 11. Any member of the Board absent from three successive meetings, who has not obtained a leave of absence, and was not excused on account of illness, is considered as having resigned.

§ 12. The Board fills all vacancies unless five or more should take place simultaneously. In this case the Board shall, before the expiration of ten days following the acknowledgement of said vacancies, call the members in conformity with Art. VI for an election.

§ 13. The Board shall annually submit the report of its administration at the Preliminary Meeting.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 14. The Board shall, under no pretext whatsoever, make use of the credit, the name or the property of the Society for any operations outside of the interest of the Society.

§ 15. The Board has the right to elect as Honorary President of the French Mutual Benevolent Society an ex-President who has rendered valuable services to the Society, whenever such a step seems appropriate.

The Honorary President shall be named by a majority of the members of the Board for the time the latter stays in office. There should never be more than one Honorary President in the Society.

§ 16. Past Presidents of the Society have the right to be present at the meeting of the Board of Directors, and to take part in discussions. They have however no right to vote.

Article X

Funds.

§ 1. The receipts of the Society are composed of admission fees, monthly dues, income from investments, life members and life boarders admission fees and the income from the operation of the Hospital.

§ 2. The Society may in addition receive donations which will be used as much as possible to conform with the wishes of the donor. Unspecified donations however shall be deposited in a special fund to be called the Benefactors Fund of La Societe Francaise de Bienfaisance Mutuelle.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 3. The amount determine by the Art. XV, §4 of the present By-Laws, and representing the depreciation on Buildings, Furniture and Equipment, shall be deposited in a special fund to be called the Depreciation Fund.

The Benefactors Fund and the Depreciation Fund shall constitute a general fund to be called the Rebuilding Fund, which will be reserved for future additions and improvements to the Hospital. The income from these funds shall revert to the current funds of the Society. The Rebuilding Fund can be used only upon a majority vote of two thirds of the members present at a General Meeting.

§ 4. The Board deposits the funds of the Society where they may draw interest, although reserving a sum sufficient to meet current expenses. The Board cannot settle, without a vote of the members, any question in which the interests of the Society might be engaged for a sum exceeding \$10 000.

§ 5. The name of any donor of a sum of \$100.00 or more together with the amount donated, shall be printed in the annual report and be read at each General Meeting.

Article XI.

Medical Service.

§ 1. Candidates for the position of Doctors for the Society must, when filing their applications, present at the same time their diplomas and their license from the State of California, and specify the

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

position for which they apply. A diploma is recognized by the Board only if granted by a college requiring a course of at least four consecutive years, and if it carries with it the right to practice in the Country or State where it was granted. The doctors having already served the Society are not subject to these conditions.

§ 2. The doctors are elected by the Board by secret ballot.

§ 3. The medical service is organized as follows:

First, salaried surgeons and salaried physicians making a tour of visits in the Hospital every morning and also receiving in consultation the city members. They shall also go to the Hospital each time they are called there for an urgent case.

Members shall have the right to select their doctor upon entering the Hospital.

Second, a resident physician at the Hospital.

Third, at least two internes.

Fourth, one or more physicians whose duty is to visit sick members, residents in the City and County of San Francisco.

Fifth, specialists whose services are defined by the Board.

§ 4 The doctors treating at the Hospital and the city physicians shall be in consultation at their offices two consecutive hours each day, excepting Sunday. Consultations shall be given the members

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

at the Hospital every Sunday, from 8 to 10 a. m., alternately, by one of the salaried physicians.

§ 5. Upon the request of a member, the city physician shall, but only in case of necessity, call in for consultation the physician treating at the Hospital. He shall, furthermore, be present at the operations performed at the Hospital each time he is requested to do so by one of the physicians treating at the Hospital, unless he himself is detained by an urgent case in his service.

§ 6. All the doctors are placed under immediate control of the Board. They shall conform, for their work, with the By-Laws of the Society as well as with the regulations established by the Board.

§ 7. Any doctor desirous of taking a leave of absence shall have to be authorized by the Board and supply a substitute who receives his salary and who shall first be accepted by the Board.

§ 8. All doctors licensed to practice medicine, including the Society doctors, excepting the resident physician, may send their own patients to the Hospital and take care of them there. These patients pay to the Society the prices paid by the paying patients.

§ 9. The regular doctors of the Society have not the right to interfere with the treatment of patients cared for by outside doctors without the consent of the latter.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article XII

Treatment of Members.

§ 1. Each member shall present his pass book to the doctor he consults. The sick members are entitled to visits at their residence from any of the Society's visiting physicians if they reside within the boundaries set forth in paragraph 4, Art. X, and if their illness prevents them from going to the physician's office. They are entitled to treatment in the Hospital, but they can only remain there if they follow a regular treatment.

The stay of a Member at the Hospital is limited to 6 months for each period of 12 months except for members affected with tuberculosis. After that time the member shall pay a minimum price of \$2.00 per day over the actual rates then in effect, without prejudice to his rights, to medical care, drugs and other treatments. The cases of indigent Members shall be referred to the Board of Directors who may draw from the Special Relief Fund the sum necessary to their hospitalization.

They are also entitled to consult there the doctors at their regular consulting hours, as well as to go to the offices of the doctors in charge of this service for consultation.

§ 2. The members being treated at the Hospital occupy the wards, but they can receive medical attention in private rooms by paying no less than one dollar and one half per day.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 3. All prescriptions delivered to non-hospitalized members by the doctors of the Society or by other doctors, shall be filled at the Hospital or at any other pharmacy appointed by the Society, against the payment of 10 cents for every article comprised in the prescription.

Drugs that are not approved by the U. S. Board of Pharmacopea or the National Formulary shall be charged at cost.

§ 4. All radiological examinations and treatments shall be charged at the rate of 10% of the regular price, the minimum price being 50 cents and the maximum price being \$2.50 for each item.

Diathermy, Hydrotherapy and Physiotherapy treatments, Basal Metabolism examinations and electrocardiograms shall be charge at the rate of 50 cents each, and Pathological examinations at the maximum rate of 25 cents each.

§ 5. Upon written request by a physician of the Hospital a member residing within the boundaries of the City of San Francisco is entitled to the use of an ambulance by communicating with the Hospital.

In urgent and needy cases, members may be brought to the Hospital at the expense of the Society.

§ 6. Admission to the Hospital shall be refused to any member suffering from Insanity, Delirium Tremens, Small Pox or any other disease which, according to City Regulations should be treated in Special Hospitals. If such a disease develops after

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

admission, doctors in charge shall hold a consultation with a specialist and take the necessary steps to transfer the patient to the proper County or State Institution. Transportation expense shall be paid by the Society.

In the above cases the Society shall not be held responsible for any accident that may occur during the course of treatment.

§ 7. Any member under the influence of intoxicating liquor and whose condition would militate against the welfare of other patients, must not be treated at the Hospital unless confined to a private room or under the care of Private Nurses.

§ 8. Any member whose injury or illness has been caused by some act or condition in the jurisdiction of the California State Workmen's Compensation Act, shall be treated at the expense of his employer and of the Insurance Company representing the employer. The Hospital reserves its rights to forward the Hospitalization bill to the Insurance Company covering the employee.

§ 9. In cases of accident where a third party is found to be responsible, and where damages are recoverable by the victim, the member shall be bound to protect the interests of the Society and to include the hospitalization costs in the action brought against the party responsible and to reimburse the Society of any expense incurred by reason of said action.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article XIII

Patients Non-Members.

§ 1. The Society admits in the Hospital patients who are non-members, treated at the minimum price of three dollars (\$3.00) per day in the wards, and five dollars (\$5.00) and up per day in private rooms. The price of the board and extra room for the nurses is specified in the regulations of the administration.

Article XIV

Special Admission.

§ 1. The right to hospitalization for invalid members does not exist.

§ 2. The Board, for benevolent purposes, may admit, provisionally, at the expense of the Society, a member not ill, who is at least 65 years of age and a member of the Society for thirty consecutive years, without means of existence, or incapacitated through age or infirmity from earning his livelihood. The manner in which the members admitted under these conditions shall be housed and kept is determined by the Board, which may impose upon them certain work they must accept, under penalty of expulsion.

§ 3. The Board may admit as life pensioners, and after payment of a sum determined by the Board, members past 65 years of age having belonged to the Society for at least twenty consecutive years. These admissions shall be ratified by the members at a general meeting.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

If the approval is refused, the Board deducts from the sum deposited an amount equal to no less than \$2.00 per day, representing the cost of maintaining of the member during his stay at the Hospital. The days during which he was sick are not included in this account.

§ 4. To operate a saving for the Society as well as to grant more comforts to certain members, the Board may send to France, or another country, at the expense of the Society, the incurables who file a request and sign a declaration of renunciation to all their rights. The request shall, in all cases, be accompanied with a certificate from two doctors of the Society stating the character of the patient's illness.

Article XV

Penalties.

§ 1. The Board shall expel any member convicted of being ill at the time of his first application; of having made a false statement concerning his age, or for not having conformed with all the conditions required by the member who feigns illness or who, by any means whatsoever, prolongs the illness he is afflicted with.

§ 2. Any member who lends his pass book to a person non-member for aiding in perpetrating a fraud, or who would cause damaging prejudice to the interests or the good reputation of the Society or would bring an unjust judiciary action against the Society, shall be punished by expulsion.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 3. The members expelled in accordance with this article or any article of these By-Laws, in any case whatever, are not entitled to any reimbursement of the sums they paid into the Society for admission or dues. Cases of expulsion shall be ratified by the General Meeting.

§ 4. Any member who has incurred a bill for treatment as the Hospital for the use of a private room or any other service, shall lose his rights until his bill is duly paid.

Bills shall become delinquent 90 days after his discharge from the Hospital. No money shall be credited to his membership account before complete payment of his obligation.

§ 5. Employees of La Societe Francaise de Bienfaisance Mutuelle are forbidden under penalty of expulsion from engaging in electoral campaigning.

§ 6. Employees are forbidden under penalty of dismissal to be purveyors to the Hospital or to be directly or indirectly connected with a firm having business relations with the Society.

Article XVI

Miscellaneous.

§ 1. An attorney, a notary or minister of a religious cult shall be called immediately to the Hospital at the request of a patient.

§ 2. At the death of a member, either at the hospital or at home, when the body is not claimed by

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

relatives or friends, the Society takes charge of the funeral, but the expenses thereof are charged to the member's estate.

In the event of a death in the Hospital, the Superintendent shall immediately notify the family or the friends of the deceased.

An indigent member who dies in San Francisco shall be buried at the expense of the Society.

§ 3. The Board shall have the books audited by an expert at least once a year.

§ 4. At the close of each term a depreciation of no less than 2% is placed against the amount represented by the buildings and furniture as designated under the heading "Hospital".

Article XVII

§ 1. These By-Laws may be modified with the approval of two-thirds of the membership of the Society or by a vote of three-fourths of the members of the Board; but in this last case the articles to be amended shall be beforehand presented as propositions to the Annual Preliminary Meeting or to any other General Extraordinary Meeting called for a definite purpose in accordance with Art. VI, Par. 5 of these By-Laws, and adopted as a recommendation by the General Annual Meeting of the members.

§ 2. Any By-Laws or amendment to the State governing corporations, shall become operative from the day of its adoption.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article XVIII

Dissolution.

§ 1. The Society may be dissolved by a vote of two-thirds of all the members entitled to vote.

§ 2. When the dissolution is decided as above provided, all the net assets after payment of all its debts and liabilities, shall be distributed in kind or in money to such permanent public charities as may be selected or designated by the Board of Directors in office at the time dissolution is determined.

Article XIX

Declaration of Policy.

§ 1. This Society has been founded and has always been operated exclusively for the humanitarian and charitable purpose of taking care of the sick without profit to any member or to any private individual or to the Society. Nothing shall be inserted in these By-Laws which may be contrary to the charitable, educational and scientific endeavor which it has pursued since its foundation.

§ 2. Being incorporated under and by virtue of the laws of the State of California, having never, in the past or in the present, been subsidized, endowed or supported, directly or indirectly by any foreign government, this Society is and has always been a purely American organization in its purposes, in its activities, in its mode of operation and in its underlying principles which require from its adherents obedience to the laws of the United States and respect for its Institutions.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Rules and Regulations

Article I

§ 1. The President of the Board selects from the members of the Board, the committees necessary for the administration of the Society, the same to be ratified by the Board.

§ 2. Members of the Finance Committee shall not be members of any other commission.

§ 3. No member of the Board of Directors shall do a commercial business with the Society or serve as surety to an employee.

§ 4. All bills must be approved by the members of the special committees to which they are attributed, and the be countersigned the Finance Committee. Unless in case of absolute impossibility, any furnishings in amounts of over \$150.00 are put in competition.

§ 5. When any furnishing is put in competition, it shall be accorded to the lowest bidder complying with the conditions required. The Committee, nevertheless, retains the right to reject all bids submitted.

§ 6. Any expense exceeding \$20.00 shall be paid by check, signed by the President and the Financial Secretary.

§ 7. Two members, successively each month are named as members of the Service Committee, to supervise strict surveillance on all that concerns the administration of the Society and of the Hospital.

§ 8. The functions of Treasurer are filled by a Bank named by the Board of Directors.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article II

Employees.

§ 1. All employees of the Society (and Hospital) are under surveillance and control of the Board of Directors.

§ 2. The Superintendent is charged with the direction of the Hospital. He sees to the strict application of the regulations governing the administration of the Hospital and controls all merchandise received. He receives the sums due from paying patients, which he deposits at intervals determined by the Board of Directors, with the Treasurer, as certified to the Financial Secretary.

§ 3. The Assistant Superintendent, charged with accounting of the Hospital, is placed under the orders of the Superintendent, whom he replaces in case of the Superintendent's absence.

§ 4. The Collector is charged with the daily duty of collecting the admission to membership charges, and the monthly dues of the members of the Society. He is to deposit his collections with the Treasurer whenever they amount to two hundred dollars. The Collector reports his monthly collections to the Board of Directors. This report mentions the number of new members in the city and their nationality, and gives a list of those who have left the Society and the reasons for so doing.

§ 5. The accountant is charged with the general bookkeeping of the Society. He reports those members who are behind in their payments. He receives

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

at his office the charges of admission to membership and the monthly dues of members paid at his office and deposits them with the Treasurer each time they attain two hundred dollars.

§ 6. The Superintendent and the Assistant Superintendent, the accountant and the collector or collectors, shall be of French birth or of French descent. They shall as well as those occupying the principal positions in the Medical Service speak the French and English language fluently.

This paragraph may be suspended in part or whole when found necessary by three-fourth affirmative vote of the entire Board of Directors.

§ 7. The Superintendent of the Hospital shall be selected among those persons qualified as experts and who can show previous experience in conducting one or more hospitals.

Article III

Hospital.

§ 1. Paying patients whether members or non-members must, on entering the Hospital, deposit at least the amount of ten days treatment (hospitalization). When a case is to be serious and necessitating a long treatment or hospitalization, the amount of deposit required on entering shall be fixed by the Superintendent on the advice of the doctor or Doctors treating the case. The above may be modified by the Board of Directors if found necessary, in some cases.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

The amount of the ten days treatment, received in advance from any non-member patient is acquired by the Society, in case of the death of the patient before the expiration of the ten days, or in case of leaving before the ten days, where the patient had been submitted to a surgical operation. (Only the amount paid for private rooms, for the days paid but not occupied, may be re-imbursed). The above paragraph may be modified or suspended by the Board of Directors when deemed necessary by circumstances involved.

The Board of Directors determines for each individual case, and upon a detailed report, the conditions under which needy persons may be given free or part free medical attention and hospitalization, and it fixes the reduction on the regular rates that are found advisable in each case.

§ 2. Any patient treated at the Hospital who refuses to submit to the rules and regulations, menaces an official or employee of the hospital, or who, by his acts or his talk, tends to impede the services of the institution may be expelled immediately from the Hospital unless his life is endangered by so doing. In such a case, a report of the circumstances involved shall be immediately forwarded to the President of the Board of Directors.

§ 3. Any visitor creating a disturbance and refusing to observe the regulations that are called to his attention may be expelled from the premises.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 4 The Superintendent is held responsible for the observance of Par. 2 and 3 of this Article.

§ 5. The Board of Directors pronounces at their next meeting against the persons found guilty of the actions cited above—if they are members, either expulsion or a suspension for a determined period according to the gravity of the fault. The Board of Directors has full jurisdiction in such cases, except in cases of expulsion, which must be ratified by the next General Assembly.

Article IV

§ 1. The annual report shall be translated into English and copies shall be printed for the use of members not acquainted with the French language.

§ 2. The Board of Directors shall publish in the principal American newspapers, notices of all meetings of the General Assemblies of the Society.

Bequests

Form of Bequest

“I give and bequeath the sum of.....

..... Dollars

to

La Societe Francaise de Bienfaisance (French Mutual Benevolent Society), San Francisco, California, (a non-profit institution).”

Place and Date.....

.....
 Witness

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Important

Members are requested to immediately notify the office of the Society of any change of address.

[Endorsed]: Filed June 27, 1944.

PLAINTIFF'S EXHIBIT No. 5

Part 2

BY-LAWS

of the

FRENCH

Mutual Benevolent

Society

Adopted at the

Special General Meeting

of March 23, 1902

San Francisco, Cal.

1931

BY-LAWS

of the

French Mutual Benevolent

Society

Article I

§ 1. Through the act of incorporation dated May 24, 1856, the Society founded on December 28, 1851, thereafter exists under the name of: French Mutual Benevolent Society.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 2. The headquarters of the Society are located in the City of San Francisco, California.

§ 3. The French language is the only one used in Members' Meetings, at the Directors' Meetings, as well as in all the records of the Society.

Article II

Purpose of the Society

§ 1. The Society is founded on the basis of mutuality for the treatment of sick members; neither political nor religious questions can ever be considered in its midst.

Article III

Admission of Members

§ 1. Any person of French birth, or descendant of French or speaking French, sound in mind and in body, and less than 50 years old, can be admitted as a member of the Society.

All persons admitted as members must abide by the present By-Laws or any amendments thereto.

§ 2. The age limit is retarded until 55 years of age for any person of French nationality who enrolls during the first year of his residence in California.

§ 3. The number of members is unlimited.

§ 4. To become a member, the applicant must present himself at the Hospital between the hours of 10 and 12 a. m., or 1 to 4 p. m., sign an application blank furnished by the office, and be examined by the Resident Physician or an Intern. If deemed

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

necessary the application may be referred to a specialist of the Society. The application is then forwarded to the Committee for action thereon.

§ 5. The admission charges are as follows: Children under 15 years, \$15.00; applicants from 15 to 30 years, \$30.00. Applicants over 30 years old must pay an additional charge of \$2.00 per additional year; after the fortieth year, the extra charge is \$3.00 per year.

Admission fees are payable in advance and if the application is not accepted, they shall be refunded. However, upon demand and with the authorization of the Board of Directors, admission fees can be paid in three consecutive installments.

§ 6. Any person complying with the conditions required by the By-Laws to become a member, may, by paying a sum of \$500, become a life member, and thus acquire the full membership without ever having to pay monthly dues.

§ 7. Members having paid monthly dues either of \$1.00, or \$1.25, or \$1.50 during 15 consecutive years may, upon application, become life members for a consideration of \$250.00.

§ 8. Any person, of whatever nationality, may be elected honorary member of the Society, at a General Meeting, by a majority vote.

Article IV

Dues

§ 1. The dues are \$1.50 per month for any member past 15 years of age and for any child whose

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

parents are not members. They are reduced to 75 cents per month for children under 15 years whose father or mother is a member.

§ 2. These children, should they become orphans, or be abandoned by their parents, are exempt from the payment of any dues until the age of 17 years, and enjoy gratuitously the same privileges all other members do.

§ 3. Dues are payable from the first of the month of which a member is admitted, thereafter on the first of each month.

§ 4. The members residing in this City, pay their dues to the Collector or at the Hospital. Those residing in other localities must pay the corresponding member for their district. Payments may be made by money-order or by check.

§ 5. Any demand for an increase in the rate of the monthly dues, or in the rate charged to members for the use of private rooms, shall be preceded by an investigation to be made by a special committee appointed at a general meeting of the members and selected outside of the regular Board of Directors. This investigation to bear on the financial standing of the Society, the possible reduction of expenditures, administrative reforms and on any measure that may help the Hospital to compete advantageously with other institutions of its kind.

Article V

Privileges of Members

§ 1. The members acquire their privileges three months after their first dues and lose them when

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

allowing three months to elapse without paying any dues. The privilege can become operative before the three months elapse in case of a fracture or other unforeseen accidents, duly certified to by a doctor of the Society.

§ 2. Any member six months in arrears in the payment of his dues is thereby stricken from the rolls of the Society, and cannot be re-admitted except as a new member, and upon payment of his back dues, unless the Board of Directors may decide otherwise.

§ 3. Any member more than six months in arrears in the payment of his dues, who is over 50 years of age, and having been affiliated for 10 consecutive years, may obtain his former privileges by paying his arrearage, and presenting a health certificate duly signed by a doctor of the Society and consented to by the Board of Directors.

§ 4. Any member going to France for his service in the Army, after having notified the Board of his departure, may be reinstated at his return and will be released from the payment of arrears or of initiation fees, provided his request for reinstatement be filed during the six months following his discharge.

Article VI

General Meetings

§ 1. The members entitled to vote meet at a General Preliminary Meeting the second Sunday

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

in March of each year. They form a bureau composed of a President, a Vice-President and a Secretary.

§ 2. All propositions relating to the administration of the Society must be introduced at this meeting where they are discussed and voted upon. They are then studied by the Board, which has them published during week preceding the General Meeting, rendering at the same time an opinion upon each one.

§ 3. The General Annual Meeting of the members takes place under the direction of the Board, the fourth Sunday in March of each year. The annual report is acted upon, as well as all the propositions introduced at the Preliminary Meeting.

§ 4. The Board has the right of calling a General Extraordinary Meeting to discuss a question of general interest, but it shall call one in the following case: Upon presentation of a request containing a specific reason, signed by at least seven per cent of voting members.

§ 5. The General Meetings can only be held on Sunday, and shall be called through due notice in the newspapers at least one week in advance. In the case of an Extraordinary Meeting the notice shall contain the cause of the meeting. No question foreign to this cause can then be discussed.

§ 6. The quorum required for a General Meeting shall consist of two hundred electors.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Article VII

Elections

§ 1. The elections for members of the Board of Directors of the Society take place on the Sunday following the General Annual Meeting.

§ 2. Members, without distinction of sex, above the age of 15 years, are entitled to vote. They must have with them their membership card in good standing and an electoral card in order to vote.

§ 3. To be eligible as a Director one must: First, be an elector, at least 21 years of age, without distinction as to sex; second, have been a member for at least one year; third, be French born or son of a Frenchman, or son of a Frenchman naturalized.

§ 4. All elections are by secret ballot and on a plurality of the votes. They are presided over by a bureau composed of a president, a secretary, two judges of election and at least four tellers. This bureau may be nominated at the Preliminary Meeting, but in this case to be legally constituted it shall be ratified by the General Meeting.

§ 5. A candidacy to the office of Director must be presented by a member in good standing at the Preparatory Meeting or to the Board of Directors during the two weeks following. The Board must prepare a list of the candidates who meet the requirements prescribed by the By-Laws. The list closes at 5 p. m. on the Saturday preceding the General Meeting and shall be published from that

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

day on in one or more French newspapers until the following Sunday, the day of the elections.

§ 6. The Board shall have printed two kinds of ballots, one on white paper and the other on colored paper. The white shall be placed at the disposal of the members three days before the elections; and the colored, stamped with the seal of the Society—the only ones to be used as ballots—shall be given out, upon presentation of a voting card, only on the election day, in the voting hall, where shall be arranged beforehand a special installation so that each voter may prepare his ballot in secret. The ballots shall contain the names of the candidates in alphabetical order and be similar to the official ballots used in the municipal elections of this City.

§ 7. After each name there is a square and the voter shall make a cross in the square placed on the right of the name of the candidate for whom he wishes to vote. Any irregular ballot—that is one containing more names voted than there are candidates to be elected—shall be declared, when the ballots are being counted, null and void for the part in which such irregularity appears.

§ 8. As soon as the results are determined the president of the elections shall announce them; they shall then be entered in the report which, after having been signed by the members of the bureau of elections, is given to the president of the Society who orders its publication.

§ 9. Any member who shall vote, or try to vote

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

more than once at an election or in any secret vote, shall be expelled from the Society.

Any person voting under a name other than his own, shall be expelled from the Society, and if not a member shall at no time be admitted as such.

Article VIII

Administration

§ 1. The Society is governed by a Board of Directors of 15 members elected in conformity with Art. VII.

§ 2. In the week following the elections, the outgoing Board shall install the new Board and transfer at this meeting all the documents and certificates of stock belonging to the Society entrusted in its care, the inventory of which shall be spread out on the minutes.

§ 3. The directors from their bureau by electing by an absolute majority, a president, two vice-presidents, a financial secretary and a recording secretary.

§ 4. The Board meets in regular meeting at least twice a month on such days as it determines.

§ 5. The President calls the Board in extraordinary meeting whenever he deems it necessary, or when a request for a call meeting is addressed to him by five Directors.

§ 6. The President, or one of the Vice-Presidents, or in their absence a member chosen by its colleagues present, presides over the meetings of the Board.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 7. The Board can hold a meeting only if eight members at least are present, and all motions shall be carried by a majority of those voting. The roll call on a motion takes place when it is requested by two members of the Board, and the vote of each member present shall be recorded in the minutes; likewise a record shall be made of a member abstaining from the vote.

§ 8. After a motion has carried, any request for reconsideration of the vote shall be presented at the same meeting by one of the members having voted with the majority; but the reconsideration shall only take place at the following meeting.

§ 9. The minutes of each meeting shall be drawn up by the Secretary, approved by the Board and signed by the President and Secretary.

§ 10. The Board appoints all the employees of the Society, fixes their salaries and the amount of bonds for those who incur responsibilities such as the Superintendent, the Collector, the Accountant, etc. These bonds shall be provided by a society legally organized and acceptable to the Board.

§ 11. Any member of the Board absent from three successive meetings, who has not obtained a leave of absence, and was not excused on account of illness, is considered as having resigned.

§ 12. The Board fills all vacancies unless five or more should take place simultaneously. In this case the Board shall, before the expiration of ten days following the acknowledgment of said vacancies,

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

call the members in conformity with Art. VI for an election.

§ 13. The Board shall annually publish the report of its administration the week preceding the second Sunday in the month of March.

§ 14. The Board shall, under no pretext whatsoever, make use of the credit, the name or the property of the Society for any operations outside of the interest of the Society.

§ 15. The Board has the right to elect as Honorary President of the French Mutual Benevolent Society an Ex-President who has rendered valuable services to the Society, whenever such a step seems appropriate.

The Honorary President shall be named by a majority of the members of the Board for the time the latter stays in office. There should never be more than one Honorary President in the Society.

§ 16. Past-Presidents of the Society have the right to be present at the meeting of the Board of Directors, and to take part in discussions. They have however no right to vote.

Article IX

Funds

§ 1. The receipts of the Society are composed of admission fees, monthly dues, income from investments, life members and life boarders admission fees and the income from the operation of the Hospital.

§ 2. The Society may in addition receive dona-

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

tions which will be used as much as possible to conform with the wishes of the donor. Unspecified donations however shall be deposited in a special fund to be called the Benefactors Fund of la Societe Francaise de Bienfaisance Mutuelle.

§ 3. The amount determined by the Art. XV, §4 of the present By-Laws, and representing the depreciation on Buildings, Furniture and Equipment, shall be deposited in a special fund to be called the Depreciation Fund.

The Benefactors Fund and the Depreciation Fund shall constitute a general fund to be called the Rebuilding Fund, which will be reserved for future additions and improvements to the Hospital. The income from these funds shall revert to the current funds of the Society. The Rebuilding fund can be used only upon a majority vote of the members present at a General Meeting.

§ 4. The Board deposits the funds of the Society where they may draw interest, although reserving a sum sufficient to meet current expenses. The Board cannot settle, without a vote of the members, any question in which the interests of the Society might be engaged for a sum exceeding \$10,000.

§ 5. The name of any donor of a sum exceeding \$100 together with the amount donated, shall be printed in the annual report and be read at each General Meeting.

§ 6. Beginning March 26, 1928, Life Member-

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

ship Admission Fees shall be deposited in a Special Fund, which shall be used only upon a majority vote of the members present at a General Meeting. The income from this fund shall revert to the current funds of the Society.

Article X

Medical Service

§ 1. Candidates for the position of Doctors for the Society must, when filing their applications, present at the same time their diplomas and their license from the State of California, and specify the position for which they apply. A diploma is recognized by the Board only if granted by a college requiring a course of at least four consecutive years, and if it carries with it the right to practice in the Country or State where it was granted. The doctors having already served the Society are not subject to these conditions.

§ 2. The doctors are elected by the Board on roll call.

§ 3. The medical service is organized as follows:

First, salaried physicians and surgeons making a tour of visits in the Hospital every morning and also receiving in consultation the city members. They shall also go to the Hospital each time they are called there for an urgent case.

Second, a resident physician at the Hospital.

Third, at least two internes.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Fourth, one or more physicians whose duty is to visit sick members, residents in the City and County of San Francisco.

Fifth, specialists whose services are defined by the Board.

Sixth, one or more dentists, who receives for his fees an amount fixed by the Board for each tooth extracted.

§ 4. The doctors treating at the Hospital and the city physicians shall be in consultation at their offices two consecutive hours each day, excepting Sunday. Consultations shall be given the members at the Hospital every Sunday, from 8 to 10 a. m., alternately, by one of the salaried physicians.

§ 5. Upon the request of a member, the city physician shall, but only in case of necessity, call in for consultation the physician treating at the Hospital. He shall, furthermore, be present at the operations performed at the Hospital each time he is requested to do so by one of the physicians treating at the Hospital, unless he himself is detained by an urgent case in his service.

§ 6. All the doctors are placed under immediate control of the Board. They shall conform, for their work, with the By-Laws of the Society as well as with the regulations established by the Board.

§ 7. Any doctor desirous of taking a leave of absence shall have to be authorized by the Board and supply a substitute who receives his salary and who shall first be accepted by the Board.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 8. All doctors licensed to practice medicine, including the Society doctors, excepting the resident physician, may send their own patients to the Hospital and take care of them there. These patients pay to the Society the prices paid by the paying patients.

§ 9. The regular doctors of the Society have not the right to interfere with the treatment of patients cared for by outside doctors without the consent of the latter.

Article XI

Treatment of Members

§ 1. Each member shall present his pass book to the doctor he consults. The sick members are entitled to visits at their residence from either city physician if they reside within the boundaries set forth in paragraph 4, Art. X, and if their illness prevents them from going to the physician's office. They are entitled to treatment in the Hospital, but they can only remain there if they follow a regular treatment. They are also entitled to consult there the doctors at their regular consultation hours, as well as to go to the offices of the doctors in charge of this service for consultation.

§2. The members being treated at the Hospital occupy the wards, but they can receive medical attention in private rooms by paying no less than one dollar and one half per day.

§ 3. All prescriptions given to members by the

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

Society doctors are filled free of charge at the drug store of the Hospital.

§ 4. Prescriptions given to members by outside physicians are also filled in our drug stores.

§ 5. Upon written request by a physician of the Hospital a member residing within the boundaries of the City of San Francisco is entitled to the use of an ambulance by communicating with the Hospital.

In urgent and needy cases, members may be brought to the Hospital at the expense of the Society.

Article XII

Patients Non-Members

§ 1. The Society admits in the Hospital patients who are non-members, treated at the minimum price of three dollars (\$3.00) per day in the wards, and five dollars (\$5.00) and up per day in private rooms. The price of the board and extra room for the nurses is specified in the regulations of the administration.

Article XIII

Special Admission

§ 1. The right to be taken in as a pensioner does not exist.

§ 2. The Board, for benevolent purposes, may admit, temporarily, at the expense of the Society, a member not ill, who is at least 65 years of age and a member of the Society for thirty consecutive years, without means of existence, or incapacitated through age or infirmity from earning his liveli-

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

hood. The manner in which the members admitted under these conditions shall be housed and kept is determined by the Board, which may impose upon them certain work they must accept, under penalty of expulsion.

§ 3. The Board may admit as life pensioners, and after payment of a sum determined by the Board, members past 65 years of age having belonged to the Society for at least twenty consecutive years. These admissions shall be ratified by the members at a general meeting.

If the approval is refused, the Board deducts from the sum deposited an amount equal to no less than \$1.00 per day, representing the cost of maintainance of the member during his stay at the Hospital. The days during which he was sick are not included in this account.

§ 4. To operate a saving for the Society as well as to grant more comforts to certain members, the Board may send to France, or another country, at the expense of the Society, the incurables who file a request and sign a declaration of renunciation to all their rights. The request shall, in all cases, be accompanied with a certificate from two doctors of the Society stating the character of the patient's illness.

Article XIV

Penalties

§ 1. The Board shall expel any member convicted of being ill at the time of his first applica-

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

tion; of having made a false statement concerning his age, or for not having conformed with all the conditions required by Art. III. The same penalty is incurred by the member who feigns illness or who, by any means whatsoever, prolongs the illness he is afflicted with.

§ 2. Any member who lends his pass book to a person non-member for aiding in perpetrating a fraud, or who would cause damaging prejudice to the interests or the good reputation of the Society, shall be punished by expulsion.

§ 3. The members expelled in accordance with this article or any article of these By-Laws, in any case whatever, are not entitled to any reimbursement of the sums they paid in to the Society for admission or dues. Cases of expulsion shall be ratified by the General Meeting.

§ 4. Employees of *La Societe Francaise de Bienfaisance Mutuelle* are forbidden under penalty of expulsion from engaging in electoral campaigning.

Article XV

§ 1. An attorney, a notary or minister of a religious cult shall be called immediately to the Hospital at the request of a patient.

In the event of a death in the Hospital, the Superintendent shall immediately notify the family or the friends of the deceased.

An indigent member who dies in San Francisco shall be buried at the expense of the Society.

(Testimony of Edward B. Pomme.)

Plaintiff's Exhibit No. 5—(Continued)

§ 2. The Board shall have the books audited by an expert at least once a year.

§ 3. At the close of each term a decrease of no less than 2% is placed against the amount represented by the buildings and furniture as designated under the heading "Hospital".

Article XVI

Corresponding Members

§1. The Corresponding Members are appointed by the Board. They receive the initiation dues and also the dues of the members in their district giving receipt therefor, and address monthly to the Accountant a statement of their accounts, and to the Financial Secretary their receipts, deducting a sum of five per cent for their services. They shall conform with the instructions of the Board.

Article XVII

§ 1. These By-Laws may be modified with the approval of two-thirds of the membership of the Society, or by a vote of three-fourths of the members on the Board; but in this last case the articles to be amended shall be beforehand presented as propositions to the Preliminary meeting, and adopted as a recommendation by the General Annual meeting of members.

§ 2. Any By-Laws or amendment to the By-Laws not conflicting with the laws of the State governing corporations, shall become operative from the day of its adoption.

[Endorsed]: Filed June 27, 1944.

(Testimony of Edward B. Pomme.)

Mr. Dessouslavy: Q. What are the qualifications for membership?

A. In order to be a member a person has to be either French or speak French or be of French descent.

Q. Does French descent mean all or partly French descent? A. Partly.

Q. Can also members of the family of a qualified member join? A. Yes. [83]

Q. The bylaws do not provide for that?

A. No.

Q. That has been the practice for many years?

A. Yes.

Q. So that if you had a member partly of French descent and his wife was of some other nationality, she is eligible? A. Yes.

Q. Anyone speaking French is also eligible?

A. Anybody who speaks French.

Q. If some stranger presented himself and spoke French, would you put him through a searching examination?

A. No, we accept his word.

Q. If he appeared to be a desirable member you would not put him through a searching examination to find out how much French he spoke, would you?

A. No.

Q. If he appeared to be a desirable member would you accept him? A. Yes.

Q. Does the plaintiff solicit members?

A. No, never.

(Testimony of Edward B. Pomme.)

Q. Do you pay any commission to anybody for bringing in any members? A. No.

Q. That has always been true, has it?

A. Yes.

Q. By the way, in connection with the nurses' training school, there are three full-time instructors? A. Yes.

Q. They give all their time to that?

A. Yes.

Q. There is also a superintendent of nurses?

A. Yes.

Q. And the training and the teaching of nurses is under the supervision of the director of the school of nurses? A. Yes.

Q. Is the nurses' school accredited by the State Board of [84] Nurse Examiners? A. Yes.

Q. Now, in addition to the nurses' home there are some school rooms in the main hospital buildings for the nurses, are there not?

A. Yes, two of them.

Q. Those rooms have desks and all the other paraphernalia of a schoolroom? A. Yes.

Q. In addition to those two schoolrooms, in the main hospital building there is also a dietetic schoolroom? A. Yes.

Q. Which is equipped with stoves and other paraphernalia? A. Yes.

Q. Would it sometimes happen that a member, though entitled to a staff physician chooses his own physician? A. Yes, sometimes.

Mr. Dessouslavy: In supplementing my state-

(Testimony of Edward B. Pomme.)

ment wherein I said originally the Treasury Department held us to be exempt, and we very largely followed out a course of conduct since that date, I could read this letter dated July 14, 1937 signed by Charles T. Russell, Deputy Commissioner of Internal Revenue, holding the plaintiff exempt from taxes. May I read it?

Miss Phillips: I think it might be offered for the Court's perusal. Of course, our position is that an earlier ruling is not conclusive; it can be taken into consideration, but I point out that it is not conclusive on the present case at all.

The Court: Let it be admitted in evidence and deemed read in evidence. It will not be necessary to read it now; I [85] will read it.

(The letter was marked Plaintiff's Exhibit 6 in evidence.)

Mr. Dessouslavy: It is pleaded in the complaint.

The Court: You say it is pleaded?

Mr. Dessouslavy: Yes.

Q. Before the plaintiff received this letter of July 14, 1937, had it made some deductions from employees' wages for taxes? A. Yes.

Q. After it received this letter what became of the deductions that had previously been made?

A. All of the moneys were refunded.

Q. Between the receipt of that letter of July 14, 1937 and about the 1st of March 1939 did plaintiff make any further deductions from employees' wages whatsoever? A. No.

Q. All of the employees' taxes in respect to the

(Testimony of Edward B. Pomme.)

period to April 1, 1939 were entirely paid from plaintiff's own funds; that is a fact, is it not?

A. Yes.

Q. And plaintiff has never gotten a cent of those payments from any single individual, isn't that correct? A. That is correct.

The Court: Do the nurses receive a salary?

Mr. Dessouslavy: Q. Do the nurses receive a salary while in training?

A. Yes, up to \$30 a month; 15, 20, and 30.

Q. That is student nurses? A. Yes.

Q. By the way, are donations and gifts shown among the plaintiff's [86] receipts? A. No.

Q. They are credited direct to the benefactors' fund? A. That is right.

Q. Permanent improvements, are they charged to receipts and disbursements, or are they charged sometimes against the benefactors' fund?

A. They are sometimes charged against the benefactors' fund.

Q. But more usually they are charged as disbursements? A. As disbursements.

Mr. Dessouslavy: That is all.

Cross-Examination

Miss Phillips: Q. Mr. Pomme, I am interested in your rules of eligibility of members. I take it from what you said that a person of entire French descent or partial French descent joins upon a showing of what his descent is? A. Yes.

Q. Is there a regular form that a person signs

(Testimony of Edward B. Pomme.)

with his name, giving his place of residence, birth, and occupation? A. That is right.

Q. Do those applications come up regularly at the board of directors' meetings? A. Yes.

Q. Each month? A. Twice a month.

Q. A person who speaks French, though he may be American or British or Spanish or something else, if he speaks French, under the rules he is entitled to join? A. Yes.

Q. Does he make any showing of his ability to speak French? [87]

A. We question him when he makes application.

Q. You have some idea whether he speaks it?

A. Yes.

Q. Then if he is accepted the wife or dependent of that member who joins then may become a member of the society? A. Yes.

Q. The children born to such a couple, do they have the right to come in?

A. They have a right also.

Q. At what age does the couple begin to pay dues for a child—as soon as the child is born?

A. As soon as the child is admitted as a member.

Q. A parent then applies for the child's membership? A. Yes.

Q. And then pay dues? A. Yes.

Q. Which is now \$1 a month? A. Yes.

Q. Then when that child becomes seventeen or eighteen—— A. Fifteen.

Q. —he is entitled to membership in his own right? A. Yes, a member from the start.

Q. And he pays the monthly rate? A. Yes.

(Testimony of Edward B. Pomme.)

Q. And then that child becomes a member for the rest of his life?

A. Well, as long as he pays his dues.

Q. Then you really reach the point that a child becomes a members because his family speaks French; the child does not necessarily speak French, yet he can become a member? A. Yes.

Q. So that in the long run would you say that at the present time you have a good many people as members over a long period of years who you might say have an inherent right to become [88] members of this society? A. Yes.

Q. So that you always have a substantial number of people who are all French or of French descent? A. Yes.

Q. And some who actually speak French?

A. Yes.

Q. And a considerable number of people who would come in as members because they were children of original members?

A. That is right.

Q. But who if actually joining themselves could not pass the qualification test? A. Yes.

Q. I think that must be so, and I was interested in figuring out whether it was so. In testifying as to the right of a member, if I understand you correctly, a member, when he becomes hospitalized, goes into a ward, pays for a ward room 50 cents a day?

A. For a ward bed.

Q. And gets free medicine, free operating room, free laboratory tests, and other medical attention?

(Testimony of Edward B. Pomme.)

A. I think there is a little mistake on my part there. There is a charge of 50 cents for some treatment, and 25 cents for therapy treatment, and the 25 cents is for X-rays, and I think if my memory is right those apply to those who are in the hospital, to all hospitalized.

Q. To all who are hospitalized? A. Yes.

Q. Whether they are in a private room or ward room? A. Or outside, yes.

Q. I think you testified that the therapy and some of these [89] other charges were at the rate of 50 cents a day? A. Yes.

Q. The charge for the ward bed is 50 cents a day? A. Yes.

Q. And the charge for a person who comes in, the general public, who is not a member, is at the rate of \$5 a day? A. Yes, \$5.

Q. That is the common rate in San Francisco for a ward? A. Yes.

Q. That is about what all hospitals charge? A. Yes.

Q. The private room rate for a member, you said, is 50 percent of what is charged to a non-member, that is, a member of the general public?

A. Yes.

Q. That depends on the location of the room, whether it has a private bath?

A. Yes. We have several prices.

Q. Your charge to the public is about the same as that in the hospitals in San Francisco?

A. Yes.

(Testimony of Edward B. Pomme.)

Q. There is not a great deal of variation?

A. No, standard rates.

Q. Pretty nearly standard? A. Yes.

Q. You testified, I think, that a member coming in gets all of these privileges for a six months' period? A. Yes.

Q. Except in the case of tuberculosis, and then he has an indefinite time limit—there is no limit on the time he may remain? A. That is correct.

Q. What happens if a member has come in and has had a ward room, let us say, for six months, paying this very moderate rate of 50 cents a day, that is, substantially \$15 a month, and he has [90] really got a ward room for \$90; at the end of six months he still needs medical care; let us say he is a person who has had some terrible automobile accident and he is pretty well smashed up; what kind of a rate do you charge at the end of six months?

A. He is allowed to stay as long as he wants for \$2 a day.

Q. The charges for physiotherapy treatment or X-ray are just the same?

A. They remain the same.

Q. What about the medical charges?

A. There is no medical charge.

Q. Even if he stays there a year or two at the \$2 a day rate? A. Yes.

Q. Does he continue to get free medicines?

A. Always the same, the same rate of 10 cents.

Q. Suppose after he has been there six months he needs an operation?

(Testimony of Edward B. Pomme.)

A. The operation is free.

Q. The operation is free? A. Yes.

Q. Your staff doctors are paid a salary by the hospital itself? A. Yes.

Q. So that they make no charge to the patient?

A. No.

Q. The amount that the hospital pays the doctor, might I ask, is that dependent on the number of patients a particular doctor has?

A. No; they are paid what I would call a retaining fee, I would say, of \$25 a month to about \$200 a month.

Q. But if a doctor comes on a retainer fee of \$25, if he finds [91] he has to do a great deal of work—if a doctor is on a retainer fee of \$25 a month, if he has a good deal of work to do, do you increase it?

A. It happens very seldom.

Q. Now, the doctors operate, do they?

A. Yes.

Q. Does the fee depend on, you might say, the standing of the doctor in the community, whether he is a specialist, or how do you do that?

A. I would say it depends on the specialty.

Q. Now, a person in the hospital who is a member has the privilege of calling some doctor not on the hospital staff? A. Yes.

Q. Whom you do not pay a salary?

A. We do not pay the salary.

Q. In that case the patient pays his own doctor, and that is between them, and you have nothing to do with that?

(Testimony of Edward B. Pomme.)

A. We have nothing to do with that.

Q. You spoke about the applications of sick and indigent members. That is, a person who has been a member for quite a while no longer is able to pay dues, and yet wants to continue this protection, you might say, to his health. Those apply to the board of directors? A. Yes.

Q. Is there a regular form for that?

A. There is no form for that.

Q. There is no written application in which he would say he had been a member for such a time?

A. No. Sometimes he doesn't even make an application, but the office or somebody connected with the hospital makes a report of it.

Q. Then the board considers it, and if a man or woman is unable [92] to pay dues but needs protection, they may give him the protection?

A. Yes.

Q. Does the relief, you might say, to such a member as that, come out of the general relief fund that you spoke of?

A. Yes, that was created for that special purpose.

Q. It was created for a special thing such as that? A. Yes.

Q. What is the source of this relief fund to which you have referred?

A. The original amount of \$2000 was out of funds advanced by the society in 1906, and since that time that fund has been by donation, but the donation has to be specified, it has to be for that particular fund, or otherwise it is given to the benefactors' fund.

(Testimony of Edward B. Pomme.)

Q. Otherwise it goes to the same permanent improvement? A. Yes.

Q. Is there any organization attached to the society that may give grand parties or balls or in some way raise money for the hospital?

A. No organization for that.

Q. There is no organized group?

A. We happen to have one, but I don't think it has got any official connection with it.

Q. I wondered whether or not there was any group of French people here who from time to time might conduct some benefit or entertainment so as to contribute to this fund.

A. No, there is nothing like that.

Q. This relief fund simply is a fund that has accumulated over a period of years from gifts and donations? A. Yes.

Q. It might be by will or it might be by a person in his [93] lifetime who wanted to give a gift for that particular purpose? A. Yes.

The Court: Q. Do you get any donations from the Community Chest?

Miss Phillips: That is a question I was going to ask you. You spoke about there being emergency cases in the vicinity. Do you get any contributions from the Community Chest?

A. We do not get any contribution whatsoever.

Q. Didn't you used to get some?

A. We used to get some kind of compensation amounting to—I don't remember how much; it was about \$1500 a year; but it has been discontinued.

(Testimony of Edward B. Pomme.)

We do not get anything from the Community Chest.

Q. When was the last year you got a contribution from the Community Chest?

A. It was last year—the contribution has been discontinued for about a year.

Q. It was discontinued last year? A. Yes.

Miss Phillips: Q. Do you take cases of emergency? A. Yes.

Q. Is there any charge if a person comes in the hospital due to an automobile accident which happens in the vicinity? Does the hospital make any charge for that?

A. First aid is given free of charge, but after that we take them in under the regular dues. Of course, we tell them that they have to pay, and if they cannot pay we furnish transportation to the City and County hospital or whatever institution they go in, but a person is never refused treatment.

Q. He comes in and gets temporary treatment until he can get in [94] touch with his own doctor?

A. Yes.

Q. Then the arrangement after that depends on the individual?

A. Yes. Of course, if a person cannot be moved or he has to stay in the hospital, we keep him.

Q. You do keep him if he cannot be moved?

A. Yes.

Q. But it would be on a charge?

A. It would be on a charge, but sometimes we cannot collect, and sometimes we have to stand the loss.

(Testimony of Edward B. Pomme.)

Q. You spoke about an old people's home. The old people's home is the home which accommodates fifteen? A. Yes.

Q. Did I understand you that there are about a dozen other people who need hospital care but who also are there for life?

A. They are simply left there because they have no other means of taking care of themselves, they have to stay there, and we keep them there; they are indigent people, sometimes paralyzed or too old to do anything.

Q. Is the right of a person to stay in the hospital a matter of application to the director?

A. Yes, an application, but a member has no right to become a life boarder—that right does not exist.

Q. Each case is an individual case?

A. Yes, that is an individual case.

Q. If a member could make a payment to defray that expense, the society would accept it, of course?

A. Yes; that all depends on the decision of the board. [95]

Q. As a matter of fact, can you tell us whether or not the life boarders, as you call them, for the most part give something?

A. Some of them do. I would judge about 55 percent pay some amount, but generally that amount is not in proportion to what they receive. We very seldom get more than \$25 from the life boarders.

Q. Is that amount paid in cash?

A. Always in cash.

(Testimony of Edward B. Pomme.)

Q. A cash payment?

A. Yes. There are no monthly dues at all.

Q. What becomes of a fund like that when a life boarder comes in—say a man is paralyzed and maybe expected to live eight or ten years, or perhaps not that long, and pay, says, \$25. Does that go into your receipts for the current year?

A. Yes, that goes into the general fund.

Q. That is simply receipts for that year?

A. Yes.

Q. I observe in the society's report for the year 1944, which has already been received in evidence as Plaintiff's Exhibit 2, an item, "\$21,200, Life Boarders Fund." How is that life boarders' fund treated? You stated a minute ago it goes in as receipts.

A. Yes.

Q. But do you set it aside?

A. No. We used to do that last year, because there was some kind of a law in the State of California requiring institutions who have old people's homes to set aside a certain amount of money for treatment of those people, and I understand that that law has been repealed. I don't know. [96]

Q. Whatever it is, you set up on your books the amount that the life boarders pay?

A. Yes, as specified by the State.

Q. That is considered, you might say, in the nature of a trust fund?

A. Yes, that is a trust fund, but that is discontinued now.

Q. Are you still maintaining it?

(Testimony of Edward B. Pomme.)

A. No, we don't maintain that fund any more.

Q. You spoke of a depreciation reserve, I think, at the beginning of 1937; I am not quite sure now. In your annual report of 1944 you have a depreciation reserve of \$144,000. Can you explain a little more how that depreciation reserve is set up? Is that a bookkeeping figure?

A. No, that is an actual cash figure. That reserve represents the amount of depreciation for the year or the accumulation of the year which we have put aside in cash.

Q. That is like any sound business concern; you compute the annual depreciation upon your permanent capital investment? A. Yes.

Q. Because that capital has worked out just that much each year? A. Yes.

Q. You actually set aside in advance that amount to take care of future improvements, is that correct?

A. Yes.

Q. You have actually put in the bank \$144,000 to take care of your depreciation?

A. Yes, in the bank or in securities.

Q. In securities? A. Yes. [97]

Q. That is separate from from your benefactors' fund, is it? A. Yes.

Q. The fund of \$76,000?

A. That is in addition.

Q. Of course, it is separate from your total capital investment which was built up by gifts?

A. Yes.

The Court: Q. Do you use these moneys for any other purpose except replacements?

(Testimony of Edward B. Pomme.)

A. They cannot be used except with the permission or authorization of the members.

Miss Phillips: Q. Do you ever have any annual meeting of the members? A. Yes.

Q. When does that come?

A. That comes the fourth Sunday of March of each year.

Q. Your regular annual business meeting?

A. Yes.

Q. Is your board of directors elected at that time?

A. No. We have two sessions of the annual meeting. We have one on the second Sunday of March of each year, and then we have the second session, which we call the general meeting, and then two weeks later we have the election of the board.

Q. Formal notice is given out to all the members? A. No, we publish that in the paper.

Q. Are they well attended?

A. Not lately.

Q. However, you do have an annual business report that is given out? A. Yes.

Q. You have your officers elected, and so forth?

A. Yes.

Q. Mr. Pomme, have you the figures which would show at this time how your income is set up for any one of the years here in [98] controversy, how your total receipts for a years are subdivided? You have so many members—let us say 9,500—who pay in so much. Then you have hospital receipts from non-paying members. Have you those figures?

(Testimony of Edward B. Pomme.)

A. Yes.

Q. Mr. Dessouslavy has just handed me a paper showing income distribution as to source for the years 1937 to 1944, inclusive, and in columns showing dues and admission fees, income from dividends, interest, and rents, special admissions, miscellaneous, paid by members for hospitalization, and then amounts paid by non-members for hospitalization, and then total income from all sources. I would like to ask you what this column, "Special Admissions,"

is. A. That is money paid by life boarders.

Q. This income from life boarders, do you charge to each member a monthly rates against the fund he has paid? A. No.

Q. You just keep that as a special fund?

A. No, that money is put in the general fund and used as we go along.

Q. I mean, do you use it for each individual or keep it there?

A. No, we keep it there. It is paid into the general fund and used as we go along.

Mr. Dessouslavy: I would like to have that paper introduced as plaintiff's exhibit next in order.

(The paper was marked Plaintiff's Exhibit 7 in evidence.)

(Testimony of Edward B. Pomme.)

PLAINTIFF'S EXHIBIT No. 7

INCOME DISTRIBUTION AS TO SOURCE

Period ending last day of Feb.	Dues and Admission Fees	Dividends Interests Rents	Special Admissions	Miscellaneous	Paid by Members for Hospitalization	Total Income from Society	Paid by non- members for Hospitalization	Total Income from all sources
1937	153,473.00	8,774.75	8,000.00	4,420.84	57,769.47	232,438.06	152,171.55	384,609.61
1938	161,436.25	8,372.76	7,250.00	2,947.85	64,315.10	244,321.96	149,039.28	393,361.24
1939	171,460.50	8,270.92		6,347.18	55,979.02	242,057.62	156,445.77	398,503.39
1940	178,717.75	7,422.66	10.00	1,322.33	69,572.41	257,045.15	152,585.02	409,630.17
1941	177,978.75	6,147.98	6,877.50	5,071.62	60,940.94	257,016.79	177,341.30	434,358.09
1942	176,857.00	5,341.06	5,000.00	1,432.85	48,011.90	236,642.81	229,828.11	466,470.92
1943	176,452.75	6,093.25		1,291.79	20,239.10	204,076.89	329,914.05	533,990.94
1944	168,822.00	7,372.71		1,100.39	43,131.65	220,426.75	460,021.81	680,448.56

[Endorsed]: Filed June 27, 1944.

(Testimony of Edward B. Pomme.)

Miss Phillips: Q. Mr. Pomme, I would like to ask you if you have any showing here as to your net income during this [99] eight-year period. Mr. Dessouslavy has handed me a paper. You have here gross incomes for the year 1937, for instance, of \$384,000, as your total income from all sources, and your total expenditures exceeded that. I think this might be offered as the next exhibit.

Mr. Dessouslavy: Yes.

(The paper was marked Plaintiff's Exhibit 8 in evidence.)

PLAINTIFF'S EXHIBIT No. 8

GROSS RECEIPTS AND DISBURSEMENTS

Year Ending Last days of February	Gross Receipts	Gross Disbursements
1937	\$384,609.61	\$410,279.37
1938	393,361.24	428,635.92
1939	398,503.39	418,508.22
1940	409,630.17	412,590.52
1941	434,358.09	489,552.30 ²
1942	466,470.92	461,407.09
1943	533,990.94	505,085.02
1944	694,288.50 ¹	624,438.38
Totals	\$3,715,212.86	Totals \$3,750,496.82
		Less 3,715,212.86
		\$ 35,283.96

Year Ending Last day of February	Excess in Receipts	Excess in Disbursements
1937		\$ 25,669.76
1938		35,274.68
1939		20,004.83
1940		2,960.35
1941		55,194.21

(Testimony of Edward B. Pomme.)

1942 ..	\$ 5,063.83	
1943 ..	28,905.92	
1944 ..	69,850.12	
Totals	\$103,819.87	\$139,103.83
		Deduction 103,819.87
Net Excess in Disbursements		\$ 35,283.96

¹ Includes \$13,839.94 Unemployment Tax refunded by State.² Includes \$63,890.66 Social Security taxes, in part previously carried as asset under caption, "Taxes in dispute".

[Endorsed]: Filed June 27, 1944.

Miss Phillips: Q. This shows the gross receipts and gross disbursements for the whole period. This also shows for the years 1937 to 1941, inclusive, you had an excess in disbursements over receipts ranging between \$2900 and \$55,000, and then for the last three years, 1942, 1943, and 1944, you have an excess of receipts over disbursements. When you take, for instance, the year 1944, it shows that you have an excess of receipts over disbursements amounting to \$69,000. What became of this surplus for that particular year?

A. Well, that is an accumulation of surplus to use later on when it is necessary.

Q. That would take care of the deficit for the five preceding years? A. Yes.

Q. In showing your gross expenditures for a particular year you include this rate of depreciation which we have already talked about? A. Yes.

Q. And it goes into a fund to take care of future replacements? A. Yes. [100]

(Testimony of Edward B. Pomme.)

Miss Phillips: Counsel has also just shown me the way you set up your depreciation account for the years 1937 to 1944, inclusive. Will that be plaintiff's next exhibit?

Mr. Dessouslavy: Yes.

(The paper was marked Plaintiff's Exhibit 9 in evidence.)

PLAINTIFF'S EXHIBIT No. 9

Year Ending Last Day of February	Depreciation
1937	9,936.71
1938	10,041.12
1939	10,432.54
1940	10,263.94
1941	10,105.44
1942	10,122.25
1943	10,085.00
1944	13,705.22
	<hr/>
	84,692.22

[Endorsed]: Filed June 27, 1944.

Miss Phillips: Q. Mr. Pomme, over a period of years did you ever look back over the records of the society to ascertain whether in the main the society has operated at a loss or whether it has broken even?

A. Well, it has been operated at a loss generally, but if it had not been for the donations and gifts I do not think the society could have subsisted.

Q. Of course, if you operated at \$10,000 a year loss and ran for 90 years you would not be in existence unless somebody took care of you. A. No.

(Testimony of Edward B. Pomme.)

Q. But would you say in the main you have operated at a loss? A. Yes.

Q. Occasionally you have had years in which you broke even? A. Yes.

Q. And some years you have gone a little bit over, is that right? A. Yes.

Q. Is that a fair statement?

A. Yes. For instance, this year there have been exceptionally good results. But some years it was very low.

Q. This year has been the case of everybody else: Your hospital has operated to full capacity?

A. Yes. [101]

Q. Have you had to close any ward for lack of nurses? A. We have had some difficulty.

Q. But you have not had to close any?

A. No, we did not close it.

Q. You have been able to keep going at full capacity? A. Yes, but it is awfully hard.

Q. I think you said that you had seven internes and three regular doctors. A. Yes.

Q. That is three doctors to take care of people and stay there, and seven internes who are in training? A. Yes.

Q. You said that your hospital has been approved by the American Medical Association as a hospital for the training of internes; is that right?

A. Yes.

Q. Do you keep a record of all cases?

A. Oh, yes.

Q. All diseases? A. Oh, yes, we do.

(Testimony of Edward B. Pomme.)

Q. Pathological records? A. Yes.

Q. To what extent are they open for study by doctors?

A. They are always open to doctors.

Q. Any doctor could come and look at your records? A. Yes.

Q. Is it one of the requirements of the American Medical Association that a hospital keep accurate records of all the cases treated? A. Yes.

Q. You only have five internes now?

A. Yes.

Q. How does that happen?

A. There is a shortage of internes [102] at the present time, but we expect to have a full complement next month.

The Court: Q. They are in the Army now; is that the reason for your shortage?

A. Of course, I am not very familiar with that, but from what I have heard there seems to be a shortage lately, the last few months, but the superintendent advised me that we will have a full complement in July.

Miss Phillips: My impression was the medical schools were running full, because the conclusion of the medical courses is more valuable to the Government.

The Court: There is a shortage of doctors just the same.

Miss Phillips: Yes, there is no doubt about that.

Mr. Dessouslavy: That is why the internes are so valuable, because they will be resident physicians.

(Testimony of Edward B. Pomme.)

The Witness: They are not resident physicians at the present time. The resident physicians have been called to the Army, and we have one of the internes who is acting as a resident physician for the time being.

Mr. Dessouslavy: Q. Ordinarily you have three resident physicians? A. We have three.

Miss Phillips: Q. There is one point that I do not think has been brought out: You have a larger number on monthly dues at \$1.75, but doesn't a member pay an initiation fee when he joins?

A. Yes.

Q. How much?

A. It is \$25 for a minor up to fifteen years [103] of age; applicants from 15 to 30, \$40, and an additional charge of \$3 for an additional year over 30 years; after the 40th year the extra charge is \$4 per year.

Q. The initiation has varied in the court of years? A. Yes.

Q. In prior years the initiation fee was far less?

A. Yes, \$5 and \$10.

Q. The rise in cost has affected that, too?

A. Yes.

Mr. Dessouslavy: Whenever the dues have been increased the increase has been made because the hospital had been losing and it was absolutely necessary?

The Witness: Yes.

Miss Phillips: Q. Was that voted on by the membership itself, or by the board of directors?

(Testimony of Edward B. Pomme.)

A. It was decided by the membership.

Q. By the membership itself?

A. By the membership.

Miss Phillips: I think that is all.

The Court: Is there any further testimony?

Mr. Dessouslavy: Yes; we will have some more documentary evidence, and I will call Mr. Bergerot as a witness.

Miss Phillips: I have another question.

Q. Is there any situation in which a non-member has ever attempted to have an indigent person as a life boarder? A. Sometimes, yes.

Q. Have you ever had a person who is not a member at all admitted to the old people's home?

A. Yes. [104]

Q. Have you ever had a person who was not a member admitted as a life boarder? A. Yes.

Q. He pays, does he not?

A. He makes a payment, but it rests on the human equation rather than anything else.

The Court: We will be in recess now until two o'clock.

(Thereupon a recess was taken until 2:00 p.m. this date.)

Tuesday, June 7, 1944—2:00 P. M.

Miss Phillips: I would like to ask the witness a few more questions, if I may.

EDWARD B. POMME

resumed.

Cross-Examination (continued)

Miss Phillips: Q. Mr. Pomme, do you attend the meetings of the board of directors?

A. Practically all.

Q. May I ask if the board of directors has rejected applications for membership? A. Yes.

Q. On what ground?

A. On the ground they have not been qualified under the bylaws, they did not meet the requirements set forth in the bylaws, that they are not French or do not speak French, or are not of French descent, and there is also some they refuse on account of examination.

Q. Sometimes a person may apply who is over age?

A. Over age, and also the physical condition.

Q. That is, the board requires a medical examination before a person becomes a member?

A. Yes.

Q. If he were suffering from some terrible disease he would not be admitted; would that be right?

A. Yes.

Q. As a practical matter has the board of directors to your knowledge ever placed a limitation on the number of memberships? A. Never. [106]

(Testimony of Edward B. Pomme.)

Q. As a practical matter, to your knowledge has the board of directors ever figured what was the maximum number of members that could be accommodated? A. Not to my knowledge.

Q. Mr. Pomme, do you know whether the board of directors has ever fixed a number which would be the limit which they could satisfactorily accommodate?

A. No, they never have, I am sure of that.

Q. To your knowledge has the board of directors ever declined an application on the ground that they had enough members?

A. No, they never have.

Q. Now, as a matter of policy is it the practice of the board of directors to wish to extend its membership?

A. I do not think so. The board of directors took them as they came, and there is no policy in that respect at all. [107]

Q. You testified that the board of directors had never had a drive for members.

A. That is correct.

Q. It has never paid a commission for getting new members? A. That is right.

Q. Have you ever had as many as 10,000 members in the past? A. Not exactly.

Q. Have you ever has as many as 9800 members?

A. Yes, we had more than that.

Q. You had pretty close to 10,000? A. Yes.

Q. Mr. Pomme, do you know why the Community Chest did not give a contribution last year?

(Testimony of Edward B. Pomme.)

A. I am not familiar with that, I don't know very much about it.

Q. Would you know whether the board of directors notified the Community Chest that they did not want a contribution?

A. I think the Community Chest notified the board of directors that conditions were such that they could not.

Q. You think the Community Chest notified the hospital? A. Yes.

Q. That conditions were such that they could not continue the contribution, is that it? A. Yes.

Q. Mr. Pomme, have you a breakdown or computation which would show the number of patient days in the hospital during the last year or so, or during the last five years?

A. I have not.

Q. Can you give it to us?

A. I have not got the figures with me, but I think Mr. Dessouslavy has them.

Q. Let me ask you what you mean by patient days. I know what [108] I think it is, but what do you mean?

A. Patient days is the number of days that a patient has been in the hospital; if a person will be therefor thirty days that makes thirty patient days.

Q. If you had a hundred patients there for thirty days then it would be 3000? A. Yes.

Q. Mr. Dessouslavy has given me a tabulation which shows for the year ending February, 1937, patient days of members 31,327, paying members

(Testimony of Edward B. Pomme.)

15,531, and non-members 20,173. What do you mean by "paying members"?

A. Those members who pay a certain amount for the use of the room.

Q. That is a member who goes into a ward and does not pay for a ward, is that it?

A. It is not counted as a paying member.

Q. I thought you testified this morning there is now a charge for every member going into a ward of 50 cents a day.

A. That is correct.

Q. Up to six months?

A. Yes.

Q. Has that always been the case?

A. No.

Q. How long ago was that rule adopted, that every member going into a ward pays 50 cents a day?

A. I think it was since 1938, if I am not mistaken.

Q. Prior to that all of the persons going into a ward paid nothing?

A. It was absolutely free.

Q. The figures are tabulated for 1937 to 1944 inclusive, and the figures appear in the following amounts; for the year 1944 I observe we have patient days for members 6901, patient [109] days for paying members, 16,379, patient days for non-members, 46,157. That would indicate, would it not, that during the last year approximately 1/3 of the patient days were members and approximately 2/3 of the patient days were non-members?

A. That is correct.

Q. Did you make this computation?

A. Yes, I did.

(Testimony of Edward B. Pomme.)

Q. That would indicate that about 45 percent of the patient days were members and about 55 percent were non-members? A. How do you mean?

Q. Will you look at this and explain it a little bit more?

A. Yes. In 1937 there were 15,531 paying members and 20,173 non-members, making a total of 35,000. There was paying members and members 46,000. That means the members were paying 75 percent and——

Q. Somewhere around 75% of the hospital is used by members and the general public use somewhere around 25 or 30%?? A. Yes.

Q. Since 1937 those figures have varied a little bit? A. That is correct.

Q. And the last two years over 50% of the hospital space has been used by non-members and less than 50% by members, is that right? A. Yes.

Q. Mr. Pomme, prior to 1937 would you say that the history of the hospital generally showed over 50% had been used by members?

A. Yes, the larger portion, from 50 to 75%.

Q. By members? A. Yes. [110]

Q. And somewhere around 25 to 30% for non-members? A. Yes.

Q. Whereas today the figures are almost the other way? A. Yes.

Q. Is that right? A. Yes.

Q. Is that the only result of the war?

A. Well, also the charges maybe that were made to members the last few years—it must be due to

(Testimony of Edward B. Pomme.)

war, because we have a certain drop in membership, we have about 800 members in the armed forces.

Q. You had about a thousand members less than eight or nine years ago?

A. We have the same count of members, but some of those people don't come to the hospital to be treated, and they would be charged as patient days.

Mr. Dessouslavy: Q. Didn't you state that you had about 9500 members?

A. 9717 members.

Miss Phillips: 9700?

A. Yes.

Q. There is a variation in the scale of charges to members recently for all sort of treatments, is there not?

A. Yes.

Q. That is, the charge now is a little larger than it was some five or six years ago, is that right?

A. There was no charge in prior years.

Miss Phillips: Has counsel an annual statement showing receipts and total expenses of the hospital available?

Mr. Dessouslavy: You have that in summarized form. That is Plaintiff's Exhibit 8.

Miss Phillips: That is all. [111]

Redirect Examination

Mr. Dessouslavy: That also includes the expenses of the nurses' home, does it not?

A. Yes.

Q. But in figuring expenses we do not charge any rent or rental value for the buildings of plaintiff?

A. No, we do not.

Q. Take a year prior to the war, what would be the average annual expense of the nurses' school?

(Testimony of Edward B. Pomme.)

A. I don't remember; maybe around \$15,000 or so.

Mr. Dessouslavy: I think that is all.

Miss Phillips: I would suggest that that statement of total patient days per annum go in evidence as plaintiff's next exhibit.

Mr. Dessouslavy: Very well.

(The statement of total patient days per annum is marked Plaintiff's Exhibit 10 in evidence.)

Mr. Dessouslavy: We offer in evidence a copy of the certificate of election of trustees of the plaintiff. It is dated May 4, 1856. It was recorded June 7, 1856, in the Office of the County Clerk. I ask that that be received as Plaintiff's Exhibit 11.

The Court: Admitted.

(Copy of certificate of election of trustees of plaintiff was marked Plaintiff's Exhibit 11.)

Mr. Dessouslavy: I offer in evidence an extract for a book written by Mr. Daniel Levy and published in San Francisco [112] in 1884; it gives some of the background. I have a copy here which is written in French and I have made a translation, and I will ask your Honor's permission to read the translation.

Miss Phillips: No objection.

Mr. Dessouslavy: That will become our Exhibit No. 12, it is in two parts.

(The extract and translation were marked Plaintiff's Exhibit 12.)

(Testimony of Edward B. Pomme.)

Mr. Dessouslavy: I will read from Mr. Levy's book:

"The Board of Directors elected in 1857 was greatly concerned with the need of furnishing the Society with a hospital which, by its size and interior design, would be in keeping with the importance to which the institution had grown. Hence, it called a meeting for the members for August 23. In the report which it had prepared on the subject, it estimated the expenses at \$25,000.

"To meet these expenses, the Society had \$5,500 in cash, and its Bush Street property valued at \$3,000, or a total of \$8,500.

"There remained the difference of \$17,000, but as there might be unforeseen expenses, the Board proposed to borrow \$20,000, and suggested the idea of issuing 400 evidences of debt of \$50 each. According to its figures, the debt could be expected to be amortized in less than eight years, thanks to the annual excess of receipts over expenses. [113]

"The report was signed: L. Galley, President; A. Nouguez and J. Caire, Vice Presidents; E. Rebard, Treasurer, Eugene Thomas and L. Mejasson, secretaries, N. Larco, A. E. Babatie, C. Roturier, A. Nouzillet, G. Mahe, T. Pons, A. Barbier, T. Voisin and G. Berger, committee.

"At the meeting there were only 75 to 80 members. As they could not agree upon certain points, it was adjourned a week.

"At the new meeting, it was decided to issue 800, instead of 400, evidences of debt of \$25 each. Mr.

(Testimony of Edward B. Pomme.)

Abel Guy agreed to collect the funds from the subscribers.

“Mr. Huerne was asked to draw up a statement of the estimated expenses for letting out the work for the new building.”

P. A. BERGEROT,

called as a witness by plaintiff; sworn

The Clerk: Will you state your name to the Court, please?

A. P. A. Bergerot.

Mr. Dessouslavy: Q. Mr. Bergerot, you reside at 1994 Jackson Street, San Francisco?

A. I do.

Q. You were born in San Francisco?

A. I was.

Q. In February, 1867? A. I was.

Q. And you have lived here nearly all of your life? A. I have.

Q. By profession you are an attorney?

A. I am.

Q. You are one of the attorneys for the plaintiff in the [114] present case, are you not?

A. I am.

Q. Was it in about 1868 that you became a member of the society?

A. I became a member in 1867.

Q. No, you were born in 1867.

A. I became a member when I was born, after I was born.

(Testimony of P. A. Bergerot.)

Q. You mean your father nominated you a member?

A. Yes, but in 1870 my folks went to Europe for health purposes and our membership was suspended until our return in 1878, and at that time I rejoined the hospital, in 1878.

Q. And since that time you have been an active member? A. All the time.

Q. Do you remember when a new hospital was built in 1894 or 1895?

A. I do, I was a member of the directors at that time.

Q. At a later date were you president of the hospital? A. I was.

Q. You have been its attorney for the past thirty or forty years? A. I have.

Q. Do you remember the financial condition which prevailed in 1894 and 1895 when the hospital was built? A. I do.

Q. Was there a condition of depression existing at that time?

A. Yes, a very severe depression.

Q. The hospital needed some money to put up buildings? A. Yes.

Q. Were the banks lending money?

A. They were not.

Q. Did you try to borrow from banks?

A. Yes. [115]

Q. Without success? A. Without success.

Q. Will you tell us whether the money was in fact raised? A. It was.

Q. How much was raised?

(Testimony of P. A. Bergerot.)

A. \$100,000 in two installments.

Q. Of \$50,000 each? A. Yes.

Q. How was that money raised? Will you explain to the Court how that money was gotten together?

A. A group of members of the French Hospital and of the French Colony in general called a meeting for that purpose.

Q. Where?

A. At the building called Union Square Hall, which is the site of the St. Francis Hotel now, on Post Street.

Q. That was on Post Street.

A. On Post Street between Powell and Mason; at that meeting it was decided to form a corporation for the purpose of raising the sum of \$100,000 to loan out to the French Hospital Society.

Q. That money was raised at that time by popular subscription?

A. By popular subscription.

Q. The name of the corporation formed was L'Union Francaise? A. Yes.

Mr. Dessouslavy: We offer a certified copy of the articles of incorporation of the L'Union Francaise.

Miss Phillips: No objection.

(The document was marked "Plaintiff's Exhibit 13.")

Mr. Dessouslavy: Q. I call you attention to the fact [116] that the articles of incorporation state that the purpose for which it was formed was to loan money exclusively to this plaintiff, a benevolent

(Testimony of P. A. Bergerot.)

corporation, that the term for which it was to exist was 25 years, that the number of its directors or trustees was to be seven; then it gives the names of the directors for the first year; the amount of the capital stock shall be \$100,000, divided into 200 shares of the par value of \$50 each; then it gives the names of the persons and societies by whom the amount has been subscribed; the total amount was exactly \$100,000.

That corporation was organized? A. Yes.

Q. And loaned \$100,000 to the French Hospital?

A. Yes.

Q. Later on when the banks were loaning money, you borrowed \$100,000 from the Hibernia Bank?

A. From the Hibernia Savings & Loan Society.

Q. And was L'Union Francaise in part later repaid by a new loan? A. Yes.

Q. But without the public subscription in 1894 you could not have proceeded with your building?

A. We could not.

Q. You are and have been familiar for many years with the bylaws of the French Hospital?

A. Yes.

Q. It has never paid any dividends or interest?

A. It never has.

Q. To your knowledge no officer or director has ever received a fee or compensation for his services?

A. He has not. [117]

Q. They have served freely and willingly and were glad to do so? A. Yes.

(Testimony of P. A. Bergerot.)

Q. By the way, you knew Mr. Daniel Levy as a boy, didn't you?

A. I knew he was Professor of French at the school I attended.

Q. Following the completion of the hospital in 1895, was there a festival of some kind?

A. Yes, a celebration at Mechanics Pavilion, the site of the present Auditorium.

Q. Were there some souvenir programs published and circulated on that occasion? A. Yes.

Q. Do you remember about what number?

A. About 25,000.

Q. Did you take any part in preparing them?

A. I did. I wrote the history of the society in that program.

Q. Your information was secured from your father in part?

A. My father, and from Mr. Daniel Levy's books.

Q. And from conversation with French people who came here in the early fifties? A. Yes.

Q. 1894 there were quite a number of French people who had come here in 1849? A. Yes.

Q. Is this the souvenir program which was published and distributed on that occasion?

A. Yes.

Mr. Dessouslavy: I think that is admissible now.

The Court: I am interested in the printing. Might I look at it?

Mr. Dessouslavy: Yes, your Honor.

The Court: That is very valuable, I think. [118]

(Testimony of P. A. Bergerot.)

The Witness: That is the only one left out of 25,000.

Mr. Dessouslavy: With your Honor's indulgence I would like to read from this:

"About 40 years ago, toward the close of 1851, at a time when San Francisco was yet in the inceptive period of its development and when the numerous seekers after fortune from all parts of the world were gathered here, a sort of population without stability and without any social or moral bond or union, a few Frenchmen conceived the idea of looking after the welfare of the sick and destitute immigrants here of their own nationality.

"In response to a call addressed to all the patriots by Mr. Etienne Derpee in the Daily Evening 'Picayune', a certain number of Frenchmen met together and organized a benevolent society. The Board of Directors of the society elected at that meeting rented in January, 1852 a small frame building on the northwest corner of Jackson and Mason Streets to temporarily receive its sick members under the direction of Dr. D'Oliveira. Later on in October, 1853, the society purchased a lot on the corner of Bush and Taylor Streets, upon which it erected at a cost of \$9659 a modern building intended for a hospital.

"Up to this period the character of the society was purely philanthropic. It extended aid and relief without distinction to all persons of French nationality, whether [119] members of the society or not. It even went farther in its charitable endeavor-

(Testimony of P. A. Bergerot.)

ors and afforded succor to the unfortunate of all nationalities. But the society was not long in perceiving that its resources were not equal to its generous impulses and that it would be necessary for it to impose a limit to its liberality. The directors sought to solve their rising difficulties by introducing into their bylaws the principle of mutuality and continuing at the same time but within narrower limits its works of charity. At about this time, that is, on the 23rd of April, 1853, it turned the name into the Mutual Benevolent Society.

“These half measures, however, did not bring about the expected result of bettering the situation of the society. Two years later, on the 24th of April, 1855, impelled by the force of circumstances, the society formally decided to establish itself exclusively on the basis of mutuality. It amended its bylaws in consequence and adopted a new designation fully characterizing the *the* end which that society has never ceased to pursue, namely, the French Mutual Benevolent Society. From that date forth, a memorable date in the history of the French colony, the society began to give full scope to its renewed energy. It is true that at rare intervals, like all other similar institutions, it has had difficulties to overcome, but the [120] number of its members kept on increasing continuously so that ere long it found itself in a situation of prosperity which enabled it to purchase an immense site on Bryant Street consisting of a lot 250 feet square upon which it built a costly hospital, inaugurated on the 15th

(Testimony of P. A. Bergerot.)

of March, 1858. This building was only one story in height but it was a great and notable improvement upon the hospital of the society previously located on Bush street.

“In less than ten years the hospital had outgrown its original capacity and the society was obliged to construct an additional story upon that old building. The new structure planned by Mr. Prosper Huerne, the architect, now presented an imposing appearance. The entire cost amounted to \$71,500, quite a large sum for the period.”

We now offer in evidence a deed to the hospital property on Geary street. This is a deed between Antoine Borel and the plaintiff. It was recorded on the 3rd of October, 1899.

Q. I believe the complaint alleges that the nurses' school which the hospital now conducts is the first nurses' school opened on the Pacific Coast.

A. Yes.

Q. Will you explain to the Court how that came about?

A. When the new hospital on Geary Street was completed in 1905——

Q. (Interrupting) 1895?

A. 1895—the board of directors at that time were confronted with the fact that we had no nurses—no hospitals had any nurses other than ordinary employees to do [121] nursing and cleaning and all the **other** types of work connected with the maintenance of the respective hospitals, and it occurred to me that we ought to have a scientifically-trained nurse

(Testimony of P. A. Bergerot.)

to take care of the sick exclusively, so I convened a meeting of the directors of the different existing hospitals in San Francisco and put up the proposition to them of creating a nurses' school in each hospital; my proposition did not seem to be met with much approval on account of the expense connected with it, but the French Hospital Society did not drop the idea; we went forward of our own volition and for our own account, to create and establish a school of nurses, and that was the first school of nurses created west of Chicago.

The Court: What year was that Mr. Bergerot?

A. 1896.

Mr. Dessouslavy: Q. You were a director of the hospital in 1895, you were president some years later, and you have been their attorney for many years?

A. Yes.

Q. Will you tell the Court in your opinion whether in the absence of gifts and donations plaintiff could have acquired its present plant or furnished the service it now affords.

A. No, it would have been practically impossible to do so.

Q. That has been vital to the hospital's growth?

A. Yes.

Mr. Dessouslavy: I think that is all. You may cross-examine.

Cross-Examination

Miss Phillips: Q. Mr. Bergerot, I am very much interested [122] in your account of this being the first nurses' school west of Chicago. When you

(Testimony of P. A. Bergerot.)

speak of the scarcity of nurses in 1895, do you mean that the trained nurses here were trained in the East, or elsewhere?

A. We had practically no trained nurses. The nurses were all of the ordinary caliber.

Q. What you would call practical nurses?

A. They not only did nursing but did all of the rest of the work connected with a hospital.

Q. There were some trained nurses, were there not? A. Yes.

Q. But they were trained in the East?

A. They were called—no, they were not scientifically trained. They were what we call practical nurses; there were practically no scientifically trained nurses at that time.

The Court: Q. Do you know when St. Luke's School of Nurses was organized here?

A. A long time after our hospital organized a nurses' training school, several years after that; nearly all of the hospitals started after the nurses graduated from our school; they were very much in demand all over the State of California, and then all of the other hospitals followed suit and established nurses' schools in their hospitals.

Miss Phillips: Q. The deed of Mr. Borel to the Geary Street lot, Plaintiff's Exhibit 14, was in 1889. You were associated with the hospital at that time, were you? A. Yes.

Q. Was Mr. Borel's deed a deed of gift?

A. No, it was for a consideration. [123]

Q. That is, was it an ordinary sale of property?

(Testimony of P. A. Bergerot.)

A. It was a sale of property.

Q. A sale of property? A. Yes.

Q. You mentioned that \$100,000 was raised in 1894 by the L'Union Francaise? A. In 1895.

Q. That was for the purpose of building the existing hospital? A. Yes.

Q. That money was subsequently paid back to the L'Union Francaise?

A. Paid back by a loan which we received from the Hibernia Savings & Loan Society.

Q. That was after the depression had gone by temporarily? A. Yes.

Q. Had there ever been a mortgage on the property? A. Yes.

Q. There have been mortgages?

A. There is a mortgage of the Hibernia Savings & Loan Society.

Q. Is that the only mortgage?

A. That was the only mortgage we ever had.

Q. What did those mortgages aggregate, did one take the place of the other?

A. No. The mortgage to the L'Union was \$100,000, and when we paid that off we borrowed from the Hibernia Bank I think a total of \$125,000, if my memory serves me right.

Q. Where did the society obtain the funds to retire the mortgage to the Hibernia Bank?

A. Mostly from legacies and bequests that came in subsequently; we got one bequest of \$200,000 subsequent to that *subsequent to that* from Mr. Sabatie.

(Testimony of P. A. Bergerot.)

Q. That would be listed in the list of gifts that has already been introduced in evidence?

A. Yes.

Q. Mr. Bergerot, can you tell us what the original cost of the hospital out there on Geary Street, the first initial plant, you might say, that was built in 1895, or '96?

A. No.

Miss Phillips: Perhaps Mr. Pomme could give me that information. I would like to have that in the record if it is possible.

Mr. Dessouslavy: Probably Mr. Pomme would know. You paid Mr. Borel about \$49,000 for the land?

Mr. Pomme: \$47,500.

Miss Phillips: This shows that the directors were authorized to spend \$200,000, which would be in addition to the land.

Q. Mr. Bergerot, I asked Mr. Pomme with respect to the policy of the Board of Directors as to a limit on membership.

A. That never was discussed or established.

Q. To your knowledge have members ever been declined for membership, because the organization felt it had enough members?

A. Never.

Q. It has declined them because of the health or because of descent qualifications, is that right?

A. Yes.

Q. But never because the organization was considered to be large enough?

A. Never.

Q. You at the present time know of no limitation to the size of the institution?

A. No.

(Testimony of P. A. Bergerot.)

Q. So far as you know, any person in San Francisco can join if he can meet the requirements?

A. Yes. [125]

Q. And can pay the dues? A. Yes.

Miss Phillips: That is all.

Mr. Dessouslavy: No further questions.

Plaintiff rests.

Miss Phillips: The government offers no evidence other than the evidence which has already been submitted and the pleadings.

(Thereupon the case was submitted on briefs to be filed 10, 10 and 5.)

[Endorsed]: Filed Feb 28 1945. [126]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
DEFENDANT INTENDS TO RELY ON
APPEAL.

Defendant hereby designated the points on which defendant intends to rely on the appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit, this designation to be filed with the transcript of the record:

The District Court erred in rendering the following Conclusions of Law:

(a) That plaintiff is now, and ever since August 14, 1935, has been, a charitable corporation within the meaning of Section 811 (b)(8) of Title VIII and of Section 907 (c)(7) of Title IX of the Social

Security Act approved August 14, 1935, and of the corresponding provisions of the Federal Internal Revenue Code; [127]

(b) That plaintiff is entitled to judgment against defendant for the sum of \$35,269.85 with interest as provided by law at the rate of six per centum per annum on the various portions thereof hereinafter set forth from the following date, viz.: (The dates and amounts of payments are set forth in the judgment and are not repeated here);

(c) That plaintiff is entitled to judgment for its costs of suit.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[128]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

R. B. McMillan, being duly sworn, deposes and says:

That his business address is 422 United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California; that he is a citizen of the United States and a resident of the City and County of San Francisco; that he is over the age of eighteen years, and not a party to the above entitled cause; that on the 5th day of April,

1945, he placed a copy of the within Statement of Points on which the Defendant Intends to Rely on Appeal in an envelope addressed to Messrs. P. A. Bergerot and A. P. Dessouslavy, Attorneys at Law, 110 Sutter Street, San Francisco, [129] California, which is the office address of the attorneys for La Societe Francaise De Bienfaisance Mutuelle, a corporation, sealed said envelope, and deposited it in the United States Mail at San Francisco, California, with the postage thereon fully prepaid; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

R. B. McMILLAN

Subscribed and sworn to before me this 5th day of April, 1945.

[Seal]

J. P. WELSH

Deputy Clerk, U. S. District Court, Nor. Dist. of California.

[Endorsed]: Filed Apr 5 1945. [130]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS

It Is Hereby Ordered that the Clerk of the above entitled Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, for use in the appeal of this case, all exhibits introduced at the trial of the above entitled cause.

Dated: April 6, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Apr 6 1945. [131]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, UNITED STATES
DISTRICT COURT, TO TRANSCRIPT OF
RECORD ON APPEAL.

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 131 pages, numbered from 1 to 131, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of *La Societe Francaise Bienfaisance Mutuelle*, a corporation, Plaintiff, vs. *United States of America*, Defendant, No. 22967 S, as the same now remain on file and of record in the office of the Clerk of said Court, and that the same constitutes the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing Transcript of Record is \$22.70; that the said amount has been charged against the *United States of America*.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 7th day of April,
A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN
Deputy Clerk. [132]

[Endorsed]: No. 11029 United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. La Societe Francaise de Bienfaisance Mutuelle, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 9, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11029

LA SOCIETE FRANCAISE DE
DE BIENFAISANCE MUTUELLE,
a corporation,

Plaintiff and Appelle,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellant.

DESIGNATION OF RECORD TO BE
PRINTED

To the Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit:

The appellant designates all of the record on appeal as certified by the Clerk of the District Court, and docketed herein;

Plaintiff's Exhibits 5, in three parts, 7, 8, and 9, for printing; the portions of Exhibit 5, Parts 1 and 2, which are in English are only to be printed.

Dated: April 9, 1945.

FRANK J. HENNESSY,

United States Attorney

R. B. McMILLAN,

Assistant United States

Attorney

Attorneys for Defendant and
Appellant.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

R. B. McMillan, being duly sworn, deposes and says:

That his business address is 422 United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California; that he is a citizen of the United States and a resident of the City and County of San Francisco; that he is over the age of eighteen years, and not a party to the above entitled cause; that on the 9th day of April, 1945, he placed a copy of the within Designation of Record to be Printed in an envelope addressed to Messrs. P. A. Bergerot and A. P. Des-souslavy, Attorneys at Law, 110 Sutter Street, San Francisco, California, which is the office address of the attorneys for La Societe Francaise De Bien-faisance Mutuelle, a corporation, sealed said envelope, and deposited it in the United States Mail at San Francisco, California, with the postage thereon fully prepaid; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

R. B. McMILLAN

Subscribed and sworn to before me this 9th day of April, 1945.

[Seal]

FRANK H. SCHMID

Deputy Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed April 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT SHALL RELY ON APPEAL.

The appellant hereby adopts the Statement of Points filed in the United States District Court, appearing in the Transcript of Record, as the points on which appellant will rely on the appeal of this case.

Dated: April 9, 1945.

FRANK J. HENNESSY,

United States Attorney

R. B. McMILLAN,

Assistant United States

Attorney,

Attorneys for Defendant and Appellant.

[Title of Circuit Court of Appeals and Cause.]

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United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

R. B. McMillan, being duly sworn, deposes and says:

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R. B. McMILLAN

Subscribed and sworn to before me this 9th day of April, 1945.

[Seal]

FRANK H. SCHMID

Deputy Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed April 9, 1945. Paul P. O'Brien, Clerk.

No. 11,029

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

LA SOCIETE FRANCAISE DE BIENFAISANCE

MUTUELLE (a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

Assistant Attorney General of the United States,

SEWALL KEY,

A. F. PRESCOTT,

PAUL S. McMAHON,

Special Assistants to the Attorney General of the United States,

Attorneys for Appellant.

FRANK J. HENNESSY,

United States Attorney,

ROBERT B. McMILLAN,

Assistant United States Attorney,

Of Counsel.

FILED

SEP 12 1945

PAUL P. O'BRIEN,
CLERK

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No. 11,029

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, vs. LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (a corporation), <i>Appellant,</i> <i>Appellee.</i>
--

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The opinion of the District Court (R. 29-37) is reported in 57 F. Supp. 201.

JURISDICTION.

This appeal involves federal social security taxes, penalties and interest. The taxes, penalties, and interest in dispute were assessed for the calendar years 1936 to 1942, inclusive. The aggregate amount involved is \$35,269.85. Payments thereof were made in

various amounts and upon various dates during the years 1939 to 1942, inclusive. (R. 12-15.) Separate claims for refund of each of the payments of taxes, penalties and interest were filed on August 3, 1943 (R. 15-16), and were rejected by notice dated October 26, 1943. (R. 16-17.) Within the time provided by Section 3772 of the Internal Revenue Code and on November 23, 1943, the taxpayer brought an action in the District Court for recovery of the taxes, penalties and interest paid. (R. 2-18.) Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. The judgment was entered on October 13, 1944. (R. 56-58.) Within three months and on January 9, 1945, a notice of appeal was filed (R. 58), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Whether taxpayer is a charitable corporation within the meaning of Section 811(b)(8) of Title VIII and of Section 907(c)(7) of Title IX of the Social Security Act and of the corresponding provisions of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED.

These will be found in the Appendix, *infra*, pp. i-iv.

STATEMENT.

The facts, as found by the District Court, are substantially as follows (R. 37) :

Taxpayer was incorporated in 1865 under Chapter VIII (relating to "Religious and other Associations or Societies") of the California Corporation Act of 1850. It succeeded an unincorporated beneficial society of the same name which had been founded in 1851. Its residence and place of business has always been at San Francisco, California. Its sole purpose has always been the care and treatment of the sick without profit, and to that end it has always maintained a non-profit hospital. (R. 38.) Taxpayer has never had any capital stock and has never paid dividends or other distributions to any one. (R. 38.) No part of its net earnings has ever inured to the benefit of any private shareholder or individual. (R. 38-39.) The corporation's affairs have been managed by a board of directors, elected annually by the members of the society, who serve without compensation. (R. 39.)

Taxpayer has acquired its present hospital plant and facilities largely through testamentary and other gifts. Receipts from members would not have been sufficient therefor. Assets acquired by taxpayer in 1856 from its predecessor largely consisted of charitable gifts. Legacies and gifts since 1851 exceed \$360,000. On February 29, 1944, the close of taxpayer's last fiscal year, a reserve of \$221,627.76 was carried on its books, of which \$76,783.87 was made up of gifts and \$114,836.89 represented its depreciation fund. (R. 39.) Under the corporation's by-laws

the reserve is set aside for enlargement and improvement of its plant and facilities. (R. 39-40.)

Prior to 1895, taxpayer owned and operated a general hospital. In and after 1894 it erected and has since owned and operated a general hospital. The plant now comprises eleven buildings located on a city block of land in San Francisco owned by taxpayer. The hospital has a capacity of 225 beds and a nursery of fifteen cribs. It is open to the public at large without any distinction. It is approved by the American Medical Association and American College of Surgeons as a "Class A" hospital. (R. 40.) In the fiscal year 1944 the average daily number of hospitalized patients was 189.71—the average number for the last eight years was about the same. (R. 40.) In 1944 the number of days treatment given to all hospitalized patients was 69,437 and for the eight year period the average number for 64,222. During the same periods the number of consultations granted to members at the hospital, or calls on members by the medical staff, averaged annually about 26,000. (R. 40-41.)

Since 1895 taxpayer has maintained a nurses' training school at an annual cost of about \$12,000. It maintains a building used exclusively as a training home for nurses. Usually sixty or seventy student nurses are in training. (R. 41.) There are also usually at least six internes in training at the institution. (R. 41.)

Taxpayer maintains in the hospital an old people's home for the care of aged or sick members, with a

capacity of fifteen beds. Such persons are admitted at the discretion of the board of directors and they pay according to ability, but not upon fixed schedules or any profit making basis. (R. 42.)

Taxpayer affords other charitable relief—providing two permanent free beds for indigent patients (R. 42) and providing free emergency treatment if necessary to all deserving cases in its neighborhood. (R. 42-43.)

The number of members is not limited; it has arranged about 9800 during the taxable periods involved. Taxpayer never solicits members and has never paid any commission to obtain new members. It has only one class of members who pay monthly dues of \$1.75, except life members who pay flat sums upon admission and children of members who pay one dollar monthly. (R. 43.) Continued payment of dues is not necessarily a condition to relief. At the discretion of the board indigent widowed or orphaned members are furnished free treatment and facilities. (R. 43.)

During the periods involved in this action members were entitled to benefits without charge or at a discount as follows: Medical and surgical consultations without charge at or outside the hospital; hospitalization without charge, including operating room, drugs, dressings, and board and room up to six months in any one year, except for a charge of fifty cents per day for ward patients and a charge of about fifty per cent of prevailing rates for private room hospitalization; special discounts from ten to ninety per cent of prevailing rates on drugs, dressings, x-ray examinations and treatments and in obstetrical cases. (R. 44.)

The expense of operation and maintenance and improvement of the hospital facilities is derived from (1) members' monthly dues; (2) admission fees of new members \$25 and upwards, according to age; (3) income from investments; (4) donations and bequests; (5) life membership fees; (6) special fees from life boarders; and (7) receipts from non-member hospitalized or treated patients. (R. 44-45.) Receipts in any year in excess of expenses are credited to a surplus accumulated to further taxpayer's purposes; deficiencies in any year are paid from surplus. (R. 45.)

There has been no change in taxpayer's plan of operations since long prior to 1936. On July 14, 1937, the then Deputy Commissioner of Internal Revenue officially notified taxpayer that it was exempt from payment of taxes imposed by the Social Security Act inasmuch as it came within the exception provided in Section 811(b)(8) of Title VIII and Section 907(c) (7) of Title IX, and further that it was entitled to exemption under the provisions of Section 101(6) of the Revenue Act of 1936. (R. 45.) On February 24, 1939, the then acting Commissioner of Internal Revenue notified taxpayer that while it appeared that the corporation was not operated for profit and did engage in substantial charitable activities, it was nevertheless not entitled to exemption from income taxes under the provisions of Section 101(6) of the Revenue Act of 1938 as a corporation organized and operated exclusively for charitable purposes, and that the ruling contained in the Bureau letter dated July 14, 1937,

was modified accordingly. (R. 45-46.) Thereafter on April 3, 1939, the Deputy Commissioner of Internal Revenue notified taxpayer, referring to the communication of February 24, 1939, that it was not entitled to exemption under Section 811(b)(8) of Title VIII and Section 907(c)(7) of Title IX of the Social Security Act. (R. 46.)

After receipt of the Bureau ruling of July 14, 1937, taxpayer refunded to its employees all the contributions which theretofore had been deducted from their wages and made no further deductions until the ruling was reversed by the letter dated April 3, 1939. Taxes, penalties and interest later paid for that interval were paid exclusively from taxpayers' funds without any deductions from employees' wages. (R. 46.)

The findings then set forth the amounts and dates of payments of social security taxes, penalties and interest involved in the action. The aggregate amount paid was \$35,269.85. (R. 47-50.) The Collectors to whom payments were made are not in office (R. 50) and accordingly the action was properly brought against the United States.

On August 3, 1943, the taxpayer filed claims for refund of all the social security taxes, penalties and interest involved in this action, which were paid for the calendar years 1936 to 1942, inclusive. (R. 50-51.) The grounds for the claims are set forth in full. Taxpayer claimed exemption from the taxes as a charitable corporation. (R. 51-54.) On October 26, 1943, the Commissioner of Internal Revenue notified the

taxpayer that the claims were disallowed on the ground that it was "an organization organized exclusively for social welfare" and was not a "corporation organized and operated exclusively for charitable purposes." (R. 54.)

Upon the above findings the District Court concluded that the taxpayer since August 14, 1935, the effective date of the Social Security Act, has been a charitable corporation within the meaning of Section 811(b)(8) of Title VIII and Section 907(c)(7) of Title IX of the Act and corresponding sections of the Internal Revenue Code, and that taxpayer is entitled to judgment for the taxes, penalties and interest paid, with interest from the dates of payments and its costs of suit. (R. 54-55.)

It is not noted in the findings but the by-laws provide that any person of French birth, or descendant of French or speaking French, sound in mind and body may be admitted to membership in the Society. (R. 91.) The qualification with respect to speaking French has been liberally construed. (R. 137.)

SUMMARY OF ARGUMENT.

In order to be held exempt from taxation as a charitable corporation the taxpayer must establish (1) that it was organized exclusively for charitable purposes (2) that it was operated exclusively for charity and (3) that no part of its net earnings inure to the benefit of a private individual.

The taxpayer's by-laws state "The Society is founded on the basis of mutuality for the treatment of sick members;". Thus it appears that the corporation was organized for the mutual benefit of its members, not for charity. This distinction has been noted by the courts and text-writers. Organizations of the nature of mutual benefit associations have been denied exemption as charities.

The taxpayer, through its hospitals has engaged in some charitable activities. But these functions were merely incidental to its main purpose, the mutual benefit of its members by obtaining for them cheaper and better medical treatment and facilities than would otherwise be available. Classification of organizations, for tax purposes, depends on their main features not incidental activities.

The taxpayer was not organized to receive and dispense charity. The by-laws provided for monthly dues from the members for treatment and charges for hospitalization. Much higher rates for hospitalization were provided for non-members. The by-laws provide that the Society may receive donations. It has received gifts and legacies from the time of organization, but for the last nine years the amounts thus received have been only one per cent or less of its gross income. The amounts received from members are not gifts, but are payments made for which the members receive contractual rights to specified medical treatment and hospitalization. The amounts contributed by non-members were in payment for services rendered. The amounts expended by the Society for concededly char-

itable purposes were very small compared to total disbursements.

The taxpayer has no shareholders and has never distributed dividends. But earnings may inure to individuals in other ways than dividends. In this case the members benefited from the earnings of the Society and its hospital through low rates, better service and facilities made available through profits on payments made by non-members.

In another case an organization which collected dues from subscribers and contracted with hospitals for treatment of members when needed was held not exempt because of inurement of benefits to members through lower rates obtained by the group plan. This case is stronger for the Government. The members of the French Society obtained the benefits inuring to them through the group or mutual benefit plan, and additional benefits from profits made by its own hospital. If the hospital had been operated solely as an eleemosynary organization, the Society itself would be taxable, nevertheless, because of inurement of earnings to the benefit of members.

Congress did not intend to exempt organizations like the taxpayer as charitable corporations. The section of the Social Security Act here involved is exactly like Section 101(6) of the Internal Revenue Code and similar sections in prior Revenue Acts. But the income tax law differs from the Social Security Tax in one important respect in addition to exempting charitable organizations of the general class of mutual benefit, fraternal, cooperative building and growers,

etc., associations. None of these specific exemptions are mentioned in the Social Security Act. The fact that Congress specifically mentioned such organizations in the income tax law indicates that they were not considered within the scope of charitable organizations. Since the taxpayer closely resembles many of the organizations specifically mentioned, Congress could not have intended it to fall within the scope of a corporation organized and operated exclusively for charitable purposes.

The opinion of the Attorney General relied upon by the District Court is not applicable here. The Attorney General held that a non-profit hospital was exempt. There was no organization of the nature of a mutual benefit association, like the taxpayer, involved; no preferential rates were given by the hospital to any group; and the question of inurement of earnings or benefits to individuals was not an issue.

ARGUMENT.

I.

THE TAXPAYER IS NOT A CHARITABLE CORPORATION WITHIN THE MEANING OF THE APPLICABLE STATUTES.

The taxpayer claims exemption from liability for social security taxes on the ground that it is a charitable corporation. Under the terms of the applicable statutes (Sections 811(b)(8) and 907(c)(7) of the Social Security Act and Sections 1426(b)(8) and 1607(c)(7) of the Internal Revenue Code) in order to be held exempt the taxpayer must establish:

- (1) that it was organized exclusively for charitable purposes
- (2) that it is operated exclusively for charitable purposes and
- (3) that no part of its net earnings inure to the benefit of private shareholders or individuals. See Section 1426(b)(8) of the Internal Revenue Code, Appendix, *infra*.

A. The taxpayer was not organized exclusively for charitable purposes and it is not operated in that manner.

The first approach in determining the reason for organization of a corporation should be an examination of its charter powers and purposes and its by-laws. The purpose of an organization must be determined from the purpose declared in the instrument creating it. *Northwestern Municipal Ass'n v. United States*, 99 F. (2d) 460, 461 (C.C.A. 8th); *Smith v. Reynolds*, 43 F. Supp. 510, 514 (Minn.). It was said in *Helvering v. Coleman-Gilbert Associates*, 296 U.S. 369, 374:

The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted.

The charter of the taxpayer is not in the record. However, the following appears in the by-laws of the French Mutual Benevolent Society, adopted March 23, 1902 (R. 119):

ARTICLE II

Purpose of the Society

The Society is founded on the basis of mutual-
ity for the treatment of sick members; * * *

Thus it appears that the Society was organized for the mutual benefit of its members, not for charitable purposes.

In *Smith v. Reynolds, supra*, the court said (pp. 513-514):

There can be little question but that a voluntary association for the mutual benefit of its members may, without difficulty, be distinguished from a public charitable institution. These distinctions have been considered by the Courts and textwriters. See: *Coe v. Washington Mills et al.*, 149 Mass. 543, 21 N. E. 966; *Young Men's Protestant, etc., Society v. City of Fall River*, 160 Mass. 409, 36 N. E. 57; 11 Corpus Juris, p. 305; 14 C.J.S., Charities, Sec. 2; 7 Corpus Juris, 1051; 10 C.J.S., Beneficial Associations, Sec. 1; 19 Ruling Case Law, 1182, section 5.

It clearly appears that the Association was organized for the mutual benefit of its members. There is no evidence that it departed from the purposes for which it was organized, nor is there any evidence that it carried on the usual activities of a charitable institution. To be entitled to the exemptions granted by either of the statutes under consideration, an association must be organized and operated exclusively for charitable purposes, with no part of the net earnings accruing to the benefit of its members. It is the general rule of law that the objects and purposes of

an organization must be determined from the purposes and objects as declared in the instrument creating it. *Helvering v. Coleman-Gilbert Associates*, 296 U.S. 369, 56 S. Ct. 285, 80 L. Ed. 278. The objects of the Association set out in its constitution are stated specifically as being the operation of hospitals for the care and treatment of its members, with the privilege of taking into such hospitals such other persons as may be admitted, as pay patients under certain conditions. There is no indication in its articles that its hospitals were to be conducted as charitable institutions. There is nothing in the evidence to indicate that the major part of the activities of the Association were charitable or benevolent. True, some charity cases were taken care of, but that fact does not in itself make the Association a charitable organization.

In *Coe v. Washington Mills*, 149 Mass. 543, 547, it was held:

To constitute a public charity, there must be an absolute gift to a charitable use for the benefit of the public. In this case the contributions of the members were not gifts for a charitable use for the benefit of the public, but they were payments for their own advantage * * *. Each member paid a regular fee or assessment, and in consideration thereof he became entitled to a certain benefit in case of sickness or accident, as a personal right. * * *

In Zollman's American Law of Charities, the following statement is made with respect to charities (pp. 143-144):

Mutual benefit societies exist in great numbers and, as their name indicates, are of much benefit to their members. The fact that payments made to them are made for the advantage of their members rather than for the benefit of the public, makes them insurance societies, and excludes them from classification as public charities. Since their benevolence begins and ends at home, they will not receive recognition as charities though they may contemplate the occasional exercise of charity, and though they aim at the suppression of vice and immorality and at the inculcation of every virtue that renders man noble, great and happy. The question is not whether they may, but whether they must, apply their property to charitable purposes. While their purposes are worthy and benevolent, they are at most private charities, and can lay no claim to any rank as public charities.

In *Philadelphia & Reading Relief Ass'n v. Commissioner*, 4 B.T.A. 713, 728, it was said:

Here, for definite contributions, paid by its members at regular recurring periods, the Association undertakes to pay its members certain definite sums in the event of sickness, accident, or death. Whatever it may be called, the scheme is that of insurance. The relation of the Association to its members is contractual, rather than charitable. Nor is it a benevolent institution. No aid is furnished from generosity or liberality. None such is pretended. On the contrary, for a pecuniary consideration the Association agrees to pay a definite sum in the cases specified. If it fails to perform its contracts with its members,

they may be enforced in the courts by suit. Certainly, under circumstances such as we have present in this case, it can not be successfully maintained that petitioner is a corporation or association, organized and operated exclusively for charitable purposes, and, hence it is not entitled to exemption from tax under the provisions of section 231(6) of the Revenue Act of 1918.

See also *Employees Benefit Ass'n of Amer. Steel Foundries v. Commissioner*, 14 B.T.A. 1166; *Pontiac Employees Mutual Benefit Ass'n v. Commissioner*, 15 B.T.A. 74; *Donnelly v. Boston Catholic Cem. Ass'n*, 146 Mass. 163; *Hassett v. Associated Hospital Corp.*, 125 F. (2d) (C.C.A. 1st), certiorari denied, 316 U.S. 672.

The taxpayer, through its hospital, has engaged in some charitable activities. The District Court found that it maintains fifteen beds for aged or sick members who are admitted at the discretion of the board of directors and who pay according to ability; it provides two permanent free beds for indigent patients (R. 42); and it provides free emergency treatment if necessary to all deserving cases in its neighborhood (R. 42-43). However, these functions appear to have been merely incidental to the main purpose of the Society which, we contend, was to obtain for its members cheaper and better medical care, treatment and facilities than would otherwise be available to them and at a lower rate than the facilities of the hospital operated by the Society are afforded to the public. Classification of an organization as charitable or non-

charitable, at least for the purposes of taxation, depends on its main features, not incidental activities. *Trinidad v. Sagrada Orden*, 263 U.S. 578; *In re Kennedy's Estate*, 269 N.Y.S. 136, affirmed without opinion, 264 N.Y. 691; *Smith v. Reynolds, supra*.

The taxpayer was not organized to receive and dispense charity. There is no indication in the by-laws of the Society that its hospital was to be conducted as a charitable institution. To the contrary it is provided that non-members shall pay a minimum of three dollars per day in the wards and five dollars and up per day in private rooms (R. 108). The members pay fifty cents per day for hospitalization in the wards and about fifty per cent of the amounts paid by outside patients for private rooms. (R. 44, 72.) The by-laws also provide that after six months a member shall pay a minimum of two dollars per day over the actual rates then in effect. (R. 105.)

The by-laws provide that the Society may receive donations which will be used as much as possible to conform with the wishes of the donor. (R. 101.) The District Court found that legacies and gifts to the Society exceed \$350,000, without which it could not have acquired its present plant and facilities. (R. 39.) However, as the California District Court of Appeal noted in *La Societe Francaise v. Cal. Emp. Com.*, 56 Cal. App. (2d) 534, 540, certiorari denied, 320 U.S. 736, the amounts received by the Society for the five year period ended February 29, 1940, as legacies, gifts and donations, amounted to only approxi-

mately one per cent of its gross income. The proportion has been ever smaller in the subsequent years, including 1944. (R. 154.)

The amounts paid by the members as admission fees, monthly dues, and for special services were not gifts. In discussing a similar situation in *Smith v. Reynolds, supra*, the court said (p. 513):

Here the Railway Company has made appreciable contributions to the Association each year. These were gifts on the part of the Railway Company, but are the payments made each month, by the members of the Association, gifts? I think not. Under the constitution and by-laws of the Association, these monthly payments by the members purchase and entitle them to certain benefits—medical care and attention, hospitalization and nursing, in case of injury or sickness; and in the event of the death of a member, a burial benefit is provided for. The member is entitled to the benefits as a matter of right, so long as he pays the dues required of him. But if he should fail to pay the monthly assessment or dues, his membership in the Association is automatically forfeited, along with any rights to the benefits provided for in the by-laws.

In passing on like contentions as are here made, the Board of Tax Appeals, in *Appeal of Philadelphia & Reading Relief Association*, 4 B.T.A. 713, 728, had this to say: “Here, for definite contributions, paid by its members at regular recurring periods, the Association undertakes to pay its members certain definite sums in the event of sickness, accident, or death. Whatever it may be called, the scheme is that of insurance.

The relation of the Association to its members is contractual, rather than charitable. Nor is it a benevolent institution. No aid is furnished from generosity or liberality. None such is pretended. On the contrary, for a pecuniary consideration the Association agrees to pay a definite sum in the cases specified." See also *Hassett v. Associated Hospital Service Corporation of Massachusetts*, 1 Cir., 125 F. (2d) 611, reversing D. C., 37 F. Supp. 822.

In the *Hassett* case, *supra*, the court held (p. 614):

The payment of a fee is a prerequisite to the receipt of benefits and the relationship existing between the corporation and the subscriber is contractual. The subscribers consider themselves neither charitable donors nor the recipients of charity.

It hardly need be said that the paying patients are not the objects of charity. As the name implies they paid for what they got. If common experience prevails those patients certainly do not consider themselves the recipients of charity. In this case also the by-laws provide that any member six months in arrears in the payment of his dues is stricken from the rolls. (R. 94.) See also *In re Hinckley*, 58 Cal. 457; *In re Sutro's Estate*, 155 Cal. 727; *In re Kennedy's Estate*, *supra*.

It has been noted above that the amounts of gifts and legacies received by the taxpayer, at least during the taxable periods involved, were insignificant in comparison with its gross income. Therefore, it can-

not be said that the Society is a charitable organization in the sense that is in any substantial degree supported by charity. On the other hand it is equally clear that the Society dispensed but little for charity. The amounts expended for the concededly charitable functions, such as the two free beds, emergency treatments, etc., are not specified in the record. Obviously, however, such amounts must have been comparatively small in comparison to total disbursements. The evidence demonstrates that, far from being operated *exclusively* for charity, as the exempting statute would require, the Society was operated *almost* exclusively as a non-charitable business organization.

B. The taxpayer is not a corporation, no part of the net earnings of which inure to the benefit of private individuals.

Corporations cannot qualify for exemption as charitable organizations if any part of their net earnings inure to the benefit of private shareholders or individuals. Section 1426 (b)(8) of the Internal Revenue Code. This corporation has no shareholders. (R. 38.) But the members of the Society are individuals within the meaning of the statute. In discussing the meaning of the term it is stated in 3 Paul and Mertens, Law of Federal Income Taxation, Sec. 32.17, pp. 579-580:

The statute expressly provides as a requisite to exemption that no part of an organization's net earnings shall inure to the benefit of private shareholders or individuals. The words "private shareholder or individual" refer to "individuals having a personal and private interest in the ac-

tivities of the corporation." Earnings do not inure to the benefit of a stockholder or individual when they inure to him merely as one of the public and in other than his private capacity. This test is independent of the other tests; it operates regardless of the fact that the purposes may be religious, educational or literary. * * *

The persons receiving the benefit of the work and operations of an organization exempt under this classification must form a substantial group of the general public. An association or organization whose charities are for the mutual assistance of its own members and families is not generally regarded as charitable. * * *

The taxpayer has never paid any dividends to anyone. (R. 38.) But it is well established that profits may inure to the benefit of shareholders in other ways than in dividends. *Northwestern Municipal Ass'n v. United States*, 99 F. (2d) 460, 463 (C.C.A. 8th); *Smith v. Reynolds*, 43 F. Supp. 510, 514 (Minn.); *Northwestern Jobbers' Credit Bureau v. Commissioner*, 37 F. (2d) 880, 883 (C.C.A. 8th). See also *Uniform Printing and S. Co. v. Commissioner*, 33 F. (2d) 445 (C.C.A. 7th); *In re Farmers' Union Hospital Ass'n of Elk City*, 190 Okla. 661.

We believe that the court below erred in finding that no part of the net earnings of the Society inured to the benefit of any private individual (R. 38-39) and in holding in the opinion (R. 33-34):

Following the same reasoning, the fact that the members benefit from the use of the hospital should not alter its character as a non-profit hos-

pital. The members pay for the service they receive. The public, of course, pays higher rates for hospitalization than the members, for it has not contributed monthly payments to the hospital. But there is no showing that the members receive less costly treatment at the expense of the public or that the amount of dues charged is not commensurate with the cost of treating the membership as a whole. The proof shows that in the eighty-seven years of its history, plaintiff has occasionally made a profit, has sometimes come out even, and has more often sustained a deficit. When profits are made or charitable donations received, both the membership and the public benefit by the improvements in hospital facilities made possible thereby.

As shown above, the charitable donations were insignificant. The profits of the Society were from payments for hospital services to non-members. It is obvious that there were profits from that source, else it would not have been possible for the Society to furnish services to its members at rates far lower than charged to non-members. If the amount of dues charged were commensurate with the cost of treatment of the membership as a whole, then there would seem to have been no justification or need for charging non-members higher rates for hospitalization.

We submit that the profits of the hospital operation do inure to the benefit of the members. This taxpayer brought actions in the California courts to recover sums paid under the California Unemployment Insurance Act (California Statutes (1935), c. 352, p.

1226; California General Laws (1937), Act. No. 8780 d, p. 4121). The opinion of the District Court of Appeal in the consolidated actions shows that the evidence and the contentions of the parties there were substantially identical with those presented in this case. *La Societe Francaise v. Cal. Emp. Com.*, 56 Cal. App. (2d) 534. It was held (p. 538, 540, 543):

Plaintiff contends that it is a corporation organized and operated exclusively for charitable purposes, and that no part of its net earnings inures to the benefit of any private shareholder or individual within the meaning of section 7 (g) of the California Unemployment Insurance Act; that, since the provisions of said section 7 (g) of the state act are adopted from the federal Social Security Act and other federal tax statutes, this court must look to "the general understanding throughout the country" for the construction of the terms employed in section 7 (g); and that under such "general understanding," the appellant is *per se* a charitable institution.

The defendant contends on the other hand that the plaintiff is not a corporation organized and operated exclusively for charitable, scientific or educational purposes, and that its earnings, or a portion thereof, do inure to the benefit of private individuals, inasmuch as the members of plaintiff receive hospitalization and other medical treatment and care, on payment of rates far lower than those charged to non-members, which preferential treatment is made possible only because plaintiff derives a profit from its services so rendered to non-members.

* * * * *

As found by the court, any profits, gains or net earnings accruing "from plaintiff's operations are devoted and applied to the better and more ample care of its members and for the furnishing to said members of said medical, hospital and other benefits and privileges prescribed and contemplated by said bylaws, and that such profits, gains and earnings are not in any form or manner distributed or paid to anyone as dividends or interest. * * * That the earnings of plaintiff arising from the furnishing of hospital and other facilities and services to individuals who are not members of plaintiff, at rates, fees or charges in excess of those applicable to members, inure to the benefit of plaintiff's members only in the sense that such earnings have been and are used to enable plaintiff, as hereinabove found, to give better and more ample and augmented service, privileges and benefits to plaintiff's members."

* * * * *

The vital question on this appeal is, did any of appellant's net earnings inure "to the benefit of any private shareholder or individual?" (Section 7g.) The facts heretofore stated demonstrate that while no profits or dividends are distributed, nevertheless the net earnings of appellant arising from its hospital facilities, and services to "non-members" at rates in excess of those generally charged members inure to the benefit of the members in augmented service and privileges which would not be available to them but for the added "outside" sources. In other words, appellant is not "exclusively" a charitable organization.

It is to be noted that the amount of income to the hospital from non-members has always been very substantial. From 1937 through 1940 the aggregate amount paid by non-members for hospitalization was two to three times that paid by members. From 1941 through 1944 the proportion has greatly increased so that in 1944 non-members paid more than ten times as much as members. From 1937 through 1940 the total amount paid by members (for admission fees, dues, etc., as well as hospitalization) was in the ratio of about five to three to that paid by non-members for hospitalization only. From 1940 through 1944 the ratio has been gradually reversed until, as shown in taxpayer's "Exhibit No. 7", in 1944, non-members paid more than twice as much for hospitalization alone as the members did for all services. (R. 154.)

From the profits through hospitalization the Society was able to carry on some purely charitable activities. But it is apparent that by far the greater part of the profits went to the benefit of the members. The admission fees and dues of the *members* remained low; hospitalization was afforded the *members* at a nominal charge; at the discretion of the board of directors the Society could furnish free treatment and facilities to indigent widowed or orphaned *members*; and could continue to serve some indigent *members* in default of dues. (R. 43.) This view is supported rather than refuted by the District Court's holding (R. 33): "The proof shows that in the eighty-seven years of its history, plaintiff has occasionally made a

profit, has sometimes come out even, and has more often sustained a deficit." Aside from its reserve fund for building and improvement of facilities (R. 39-40), it does not appear that the Society had any reason to accumulate money, it could not distribute cash to anyone, but its profits could be and were used largely for the benefit of members through low rates and improved services and facilities.

The District Court relied upon the case of *United States v. Proprietors of Social Law Library*, 102 F. (2d) 481 (C.C.A. 1st), which was distinguished in the *Hassett* case, *supra*. (R. 32-33, 35-36.) There the corporation was held exempt from the capital stock tax under the provisions of Section 101 (6) of the Revenue Act of 1934, which corresponds to the exempting statute involved in this case. The Social Law Library was chartered in Massachusetts in 1814 as a charitable or educational institution. It is housed free in the Suffolk County Court House and receives \$1,000 annually from the County. Its facilities are open to all who become "Proprietors", and free of charge to certain state and federal officials. It was operated exclusively for educational purposes and it was held that the public benefited directly and indirectly through better administration of the law by reason of knowledge obtained by those entitled to use the library. Its earnings were used to improve its facilities, but the court held that fact did not take the institution out of the classification as an educational organization. There are points of similarity in the cases. But the vital one is lacking—the proprietors

did not benefit at the expense of outsiders. The same rate was paid by all proprietors. Moreover, the general public received direct benefits from the operation of the library, which can hardly be said with respect to the French Society.

In the *Hassett* case, *supra*, the subscribers paid fees to an organization which contracted with hospitals to provide certain care to the members when needed. Thus through the group plan the members received care in cases of sickness or accident at low rates. The Circuit Court of Appeals held that the organization was similar to a mutual insurance company or an employee benefit plan. On that basis it was denied exemption as a charitable corporation. The court distinguished the *Social Law Library* case on the ground, among others, that the corporation in the case at bar (the hospital contracting organization) was more akin to a business organization than the one involved in the *Social Law Library* case. The court below quotes the *Hassett* case, with approval, but points out that the corporation there did not own or operate a hospital. We believe that very fact strengthens rather than weakens the Government's position in this case. Had the French Society merely collected dues from persons of French nationality or descent and then in turn obtained for them medical treatment and hospitalization at low rates at outside hospitals, it would not be exempt, under the *Hassett* decision. But the Society gained for its members the greater advantages discussed above through operating its own hospital. It would certainly violate the statute to

grant exemption to the corporation as a charity if we are correct in the view that operation of the hospital by the Society merely enhanced the inurement of benefits to its members.

This leads to the final point that we desire to urge in this part of the argument. Of course, we do not concede that the French Hospital was operated as a charitable corporation, entitled to exemption from social security taxes. But even if it were the Society itself, which is the employer here, would not be exempt. In the *Hassett* case it does not appear whether or not the hospitals with which the organization contracted for treatment of its members were classified as charitable corporations. It would make no difference. The organization being of the nature of a mutual benefit association is not exempt. The method of operation of the contracting hospitals cannot affect the contracting corporation's taxable status. So, too, we submit that in this case the taxpayer is of the nature of a mutual benefit association. It was not organized or operated exclusively for charitable purposes. Its earnings inure to the benefit of its individual members. Therefore, even if the hospital were operated solely as an eleemosynary institution it would be of no moment, and the Society, as such, would not be entitled to the tax exemption it claims.

II.

**CONGRESS DID NOT INTEND TO EXEMPT ORGANIZATIONS
LIKE THE TAXPAYER AS CHARITABLE INSTITUTIONS.**

The District Court held (R. 37) :

A non-profit hospital which has no stock and pays no dividends renders a public service, and I think Congress has clearly shown its intent to exclude such hospitals from the provisions of the Act.

The court referred to the opinion of the Attorney General dated November 2, 1943, addressed to the President, 40 Op. A.G. No. 72, wherein it was held that the legislative history clearly shows that the language of the exemption statute was adopted by Congress with knowledge that it had been construed to exclude non-profit hospitals. We do not disagree with the opinion of the District Court in this regard. But we emphasize that the scope of the Attorney General's opinion is confined to *non-profit hospitals*. It does not cover organizations like the French Society whose members receive medical care either at, or outside of the hospital, and the earnings of which inure to the benefit of members.

Before discussing the Attorney General's opinion we invite the court's attention to the following extract from the opinion of the California District Court of Appeal case, which we believe clearly demonstrates that Congress did not intend to exempt corporations of the character of the French Society (pp. 546-547) :

Further, we are unable to agree with appellant as to the view, purpose and intent of Congress, that hospitals not operated for profit are charita-

ble institutions. In the *Hassett* case, an action to recover taxes alleged to have been illegally collected under certain provisions of the Social Security Act on the ground that the corporation was operated exclusively for charitable purposes by reason of the fact that its earnings did not inure to the benefit of shareholders or individuals, the court (pp. 615-616) said: "That Congress did not intend organizations similar to the plaintiffs to be considered corporations organized and operated exclusively for charitable purposes is borne out by an examination of the statutes. The section of the Social Security Act here involved is exactly the same as Section 101 (6) of the Revenue Act of 1934, 26 U.S.C.A. Int. Rev. Code, sec. 101 (6), dealing with exemptions from income taxation. The income tax law, however, differs from the social security law in one important respect. In addition to the exemption granted to corporations organized and operated exclusively for charitable purposes, it also grants exemptions to certain types of mutual savings banks; fraternal beneficial societies; cooperative building and loan associations and banks; cooperative cemetery companies; benevolent life insurance associations of a purely local character; mutual ditch and irrigation companies; mutual or cooperative telephone companies or like organizations; farmers' or other mutual hail, cyclone, casualty or fire insurance companies or associations; farmers', fruit growers' or like associations organized and operated on a cooperative basis; voluntary employees' beneficial associations providing for the payment of life, sick, accident or other benefits to the members of such associations or their dependents; and teachers'

retirement fund associations. None of these specific exemptions is contained in the Social Security Act. The fact that Congress specifically mentioned these organizations, even though the statute contained the exemption granted to corporations organized and operated exclusively for charitable purposes, would seem to indicate that Congress did not consider these organizations specifically mentioned to be within the scope of a charitable organization. Since the plaintiff closely resembles many of the organizations specifically exempted, Congress could not have intended it to fall within the scope of a corporation organized and operated exclusively for charitable purposes."

A. The Attorney General's opinion does not apply to organizations of the character of the taxpayer.

It is the contention of the Government that the opinion of the Attorney General does not apply to organizations of the character of the taxpayer but that it is confined to the operation of non-profit *hospitals*.

The opinion follows:

November 2, 1943.

The President.

My Dear Mr. President: I have the honor to refer to your memorandum of August 16 with which you transmitted a letter of the Acting Administrator of the Federal Security Agency requesting my opinion whether services performed for Maynard Hospital, Inc., of Seattle, Washington, are excepted from the definition of "employ-

ment'' in section 209(b) of the Social Security Act, as amended.

This question arises under Title II of the Social Security Act, as amended (49 Stat. 620, 622; 53 Stat. 1360, 1362), which deals with Federal Old-Age and Survivors Insurance Benefits. This title is administered wholly by the Social Security Board. On the other hand, the taxing provisions of the Social Security Act (Federal Insurance Contributions Act; Internal Revenue Code, sec. 1400 *et seq.*, as amended) are administered by the Bureau of Internal Revenue, under the direction of the Secretary of the Treasury.

Paragraph 8 of section 209 (b) of the Social Security Act excepts from the definition of "employment" service performed in the employ of a "corporation * * * organized and operated exclusively for * * * charitable * * * purposes * * *."

Section 1426 (b) (8) of the Internal Revenue Code (Federal Insurance Contributions Act) provides for exactly the same exemption from "employment" as that contained in section 209 (b) (8) of the Social Security Act. Also, these provisions are identical with section 101 (6) Internal Revenue Code, relating to exemptions from income taxes, which statute is administered by the Bureau of Internal Revenue.

It is unnecessary here to set forth the facts in detail. It is sufficient to say that Maynard Hospital, Inc., was organized under the laws of the State of Washington as a non-profit, charitable organization. The Board has determined, on the facts developed in hearings held, that the hospital

is not in fact organized and operated exclusively for "charitable purposes" and has ordered the wages of an employee of the hospital to be credited to her on the wage records of the Board.

Thus, the Board has already decided the matter and proceeded in accordance with that decision. Under such circumstances, the courts ordinarily give weight to an administrative construction of a statute and will not overrule it unless clearly wrong, or unless a different construction is plainly required. * * *

If I should conclude that the Board is wrong the wage earner involved would be entitled under the statute to take her case to court. An opinion, if rendered by me, would not be binding upon private parties or the courts. Also, this Department would be charged with the defense of any court action or actions brought by employees. Under such circumstances, it has been the uniform rule of the Attorneys General to decline to render an opinion. * * *

But in the present case the Bureau of Internal Revenue has held that the services rendered to Maynard Hospital, Inc., are exempt from the term "employment" and that the hospital is not subject to tax under section 1426 (b) (8) of the Internal Revenue Code. These conflicting interpretations made by the Board and by the Bureau of Internal Revenue of identical language in these two closely related statutes, if adhered to, would result in giving employees of the hospital the benefit of the statute without collection of the corresponding tax.

The Secretary of the Treasury has not requested my opinion on the question nor has he joined in the request of the Social Security Board. Investigation discloses, however, that the Bureau of Internal Revenue's interpretation of the statute is in accord with its interpretation of similar language contained in the income tax law, which interpretation was made some years prior to the enactment of the Social Security Act, and apparently has been consistently followed.

In addition, the legislative history of the Social Security Act shows that the conferees eliminated a specific amendment exempting hospitals as surplusage on the ground that the language in the income tax law, identical with that contained in the House bill, has been uniformly construed by the Bureau of Internal Revenue as exempting hospitals not operated for profit, "and also on the fear that the insertion of the words added by the Senate amendment might interfere with the continuation of the long-continued construction of the income-tax law." H. Rept. 1540, 74th Cong., 1st sess., p. 7. Thus, the history clearly shows that the language of the exemption in the statute was adopted by the Congress with knowledge that it had been construed to exclude non-profit hospitals. This, I think, demonstrates congressional approval of that construction and evidences the intention that the exemption in the Social Security Act should receive the same construction.

In view of the above, I feel constrained to advise the Board to abandon its interpretation and

to adopt one in accord with that made by the Bureau of Internal Revenue.

Respectfully,

Francis Biddle.

The opinion must be considered in the light of the question that was submitted to the Attorney General which was simply whether or not a non-profit hospital should be classified as an exempt charitable institution for social security tax purposes. Maynard Hospital, Inc., was not a society of persons banded together for the benefit of the members. It did not resemble a mutual benefit society. There is no showing that any group had a right under contract or otherwise to treatment or hospitalization at a rate less than that charged to others. The vital question as to whether or not there was, or could be, inurement of benefit to any private shareholder or individual was not presented to the Attorney General. The opinion makes no reference to the phrase "no part of the net earnings of which inures to the benefit of any private shareholder or individual." (In all of those respects, and in other details, the question presented to the Attorney General differs from this case.) Accordingly, we submit that the opinion has no application to the present case.

CONCLUSION.

We submit that the taxpayer is not a corporation organized and operated exclusively for charitable purposes, no part of the net earnings of which inures to the benefit of any private individual. The court below, in holding to the contrary, was in error and its judgment should be reversed.

Dated, September 5, 1945.

Respectfully submitted,

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(Appendix Follows.)

Appendix

Internal Revenue Code:

SEC. 1426. DEFINITIONS.

When used in this subchapter—

* * * * *

(b) *Employment*.—The term “employment” means any service of whatever nature, performed within the United States by an employee for his employer, except—

* * * * *

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

* * * * *

(26 U.S.C. 1940 ed., Sec. 1426.)

The above section corresponds to Section 1607(c)(7) of the Internal Revenue Code, Section 811(b)(8) of Title VIII of the Social Security Act, c. 531, 49 Stat. 620 and Section 907(c)(7) of Title IX of the Social Security Act.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this title—

* * * * *

(6) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * *

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes;

* * * * *

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.215. *Religious, charitable, scientific, literary, and educational organizations and community chests.*—Services performed by an employee in the employ of an organization of the class specified in section 1426 (b) (8) of the Act are excepted.

For purposes of this exception the nature of the services performed is immaterial; the statutory test is the character of the organization for which the services are performed.

In all cases, in order to establish its status under the statutory classification, the organization must meet the following three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals; and

(3) It must not by any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

Corporations or other institutions organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that an organization established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily affect its status under the law.

An educational organization within the meaning of section 1426(b)(8) of the Act is one designed primarily for the improvement or development of the capabilities of the individual, but, under exceptional circumstances, may include an association whose sole purpose is the instruction of the public, or an association whose primary purpose is to give lectures on subjects useful to the individual and beneficial to the community, even though an association of either class has incidental amusement features. An organization formed, or availed of, to disseminate controversial or partisan propaganda is not an educational

organization. However, the publication of books or the giving of lectures advocating a cause of a controversial nature shall not of itself be sufficient to deny an organization the exemption, if carrying on propaganda, or otherwise attempting, to influence legislation form no substantial part of its activities, its principal purpose and substantially all of its activities being clearly of a nonpartisan, noncontroversial, and educational nature.

Since a corporation or other institution to be within the prescribed class must be organized and operated exclusively for one or more of the specified purposes, an organization which has certain religious purposes and which also manufactures and sells articles to the public for profit is not within the statutory class even though its property is held in common and its profits do not inure to the benefit of individual members of the organization.

An organization otherwise within the statutory class does not lose its status as such by receiving income such as rent, dividends, and interest from investments, provided such income is devoted exclusively to one or more of the specified purposes.

So far as material to this case, the above corresponds to Section 403.215 of Regulations 107, promulgated under the Federal Unemployment Tax Act; Article 206(7) of Regulations 90, promulgated under Title IX of the Social Security Act; Article 12 of Regulations 91, promulgated under Title VIII of the Social Security Act.

No. 11,029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

LA SOCIETE FRANCAISE DE BIENFAISANCE

MUTUELLE (a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

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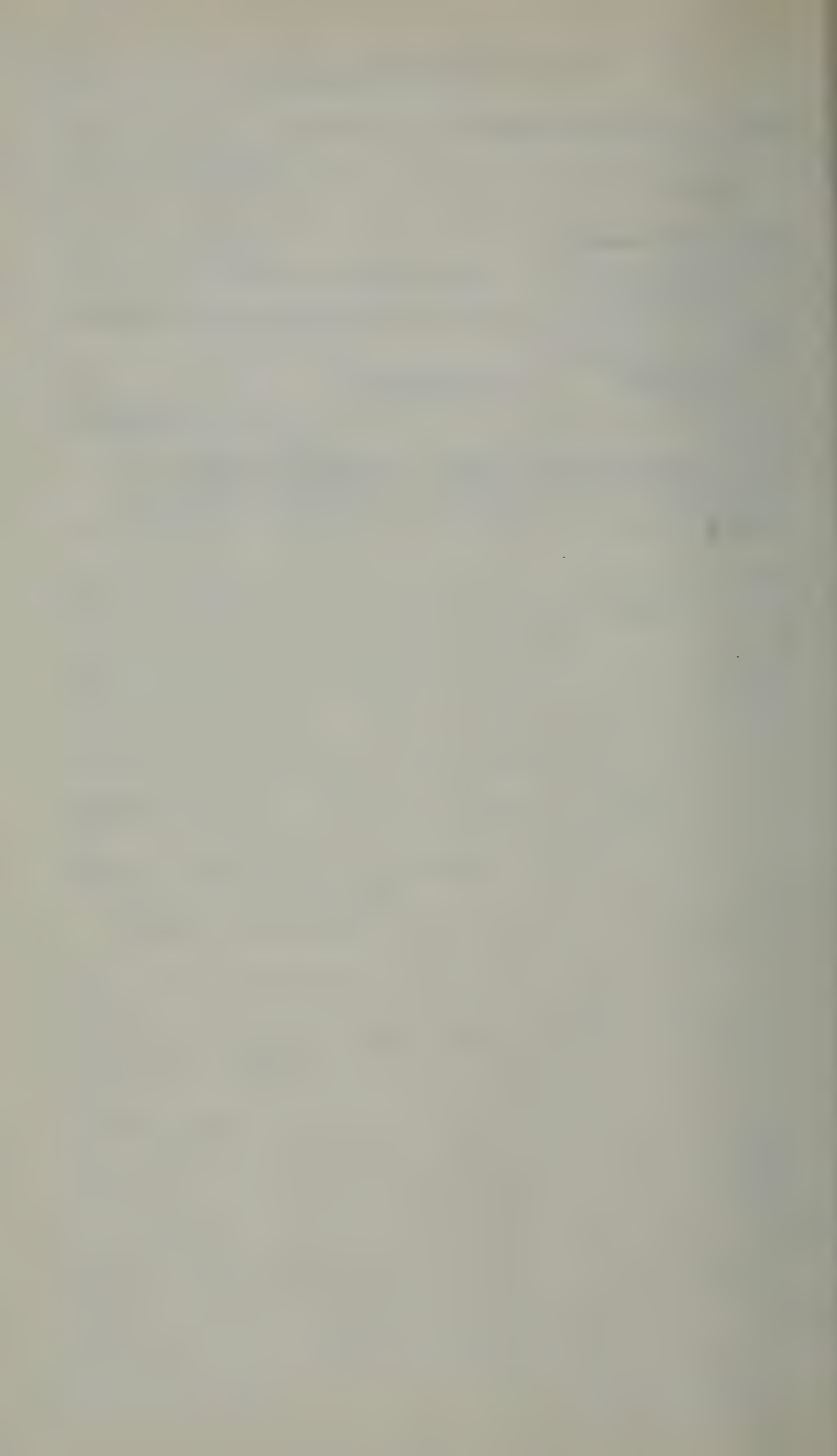
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No. 11,029

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

LA SOCIETE FRANCAISE DE BIENFAISANCE

MUTUELLE (a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The following supplements the brief for appellant.

1. Taxpayer was incorporated in 1856 (R. 38)
2. The entire by-law, a portion of which appellant quotes, provides:

“The Society is founded on the basis of mutual-
ity for the treatment of sick members; neither
political nor religious questions can even be con-
sidered in its midst.”

The emphasis evidently is on plaintiff's non-political
and non-sectarian character and the treatment of the

sick, rather than upon restriction of benefits to members. That no such restriction exists is shown by its charitable activities. Its certificate of incorporation is silent on this point.*

3. Appellee also furnishes other forms of gratuitous relief:

(a) In the case of indigent member-widows and other needy members, their dues, at the discretion of the Board of Directors, are paid from appellee's relief fund set up, in 1905, for that purpose, and since added to, (R. 43);

(b) At the Board's discretion, other indigent members are cared for in illness without charge, and without limit of time, and are furnished private rooms and other needed facilities, (R. 43);

(c) Although members are entitled, without charge, to six months' hospitalization, in tuberculosis cases the time of hospitalization is unlimited, (R. 44);

(d) A member under seventeen years, if orphaned or abandoned by his parents, pays no dues, nor do members in the armed forces of the United States nor student nurses who are members, (R. 43);

(e) Aged members can be admitted to the old people's home without the payment of any charge, (R. 42);

*This certificate (Plff's Exh. No. 11) does not state the purposes of the society nor seek to limit its benefits to members. It is signed by the "Judges of the Election" held by it May 4, 1856, and, as required by the statute, merely certifies that, on that date, the members met for the purpose of incorporating themselves and, by a plurality of votes, elected fifteen trustees and determined that said trustees and their successors should forever be called and known by the name appellee still bears.

4. The fifteen beds in the Old People's Home are at all times fully occupied, (R. 42). Admission thereto is not upon any fixed schedule of rates nor upon any profit making basis, but upon the applicant's needs and ability (if any) to pay and upon social and humane considerations.

5. Appellee has always admitted new members, (R. 43).

6. Applicants need only be partly of French descent, and members of the family of a qualified member can be admitted, (R. 137).

7. No dividends, interest, sick or death benefits, or other pecuniary benefits or distributions, have ever been paid to any one, (R. 38).

8. Appellee's hospital is open to the public at large without distinction as to race, creed or color, and its equipment, services and facilities are adapted and available for the treatment of every kind of human illness, (R. 40).

9. Chapter VIII of the Corporation Act of 1850 (Stats. 1850, p. 374) authorizes appellee to take and hold property, real and personal, by gift or devise, and to take, hold and improve real and personal property and to erect hospitals and other buildings, (R. 40).

10. Without the gifts which appellee has received, and the income therefrom, appellee could not have acquired, improved or enlarged its present plant, nor afford the facilities which it furnishes, (R. 39).

11. There are fifteen directors, (R. 39).

12. The amount of the depreciation fund is \$144,836.89, (R. 39).

13. Appellee's members are also entitled without charge, among other things, to medical and surgical care and consultations by a staff of physicians specially appointed therefor, who give consultations either at, or outside of, said hospital, and to special discounts (from ten to ninety per cent of prevailing prices) on drugs and dressings, X-Ray examinations and treatments, on diathermy, hydrotherapy, physiotherapy treatments, metabolism examinations, electrocardiograms, and in obstetrical cases, (R. 44).

14. Taxes for the period from January 1, 1937, to March 31, 1939, including those on employee's wages, and penalties, and interest, were entirely paid by appellee and were never reimbursed, (R. 46).

SUMMARY OF ARGUMENT.

I. The legislative history of the Social Security Act conclusively shows (a) that Congress considered hospitals "not operated for profit" to be "charitable" corporations, and (b) that it intended that such hospitals should be excluded from the operation of the Act.

In November 1943, Attorney-General Biddle advised the President (40 Op. A.G. No. 72) that this legislative history "clearly shows that the language of the exemption in the statute was adopted by the Congress

with knowledge that it had been construed to exclude nonprofit hospitals", and that Congress intended that "the exemption of the Social Security Act would receive the same construction." This opinion was rendered because of conflicting interpretations by the Social Security Board and the Bureau of Internal Revenue. Furthermore, the Committee reports show:

1. The Conference Committee report states, explicitly, that hospitals "not operated for profit" were to be exempt; and

2. The report of the House Committee on Ways and Means, and that of the Senate Committee on Finance, each states (a) that 9,389,000 "gainful workers" were to be excluded; (b) that among those so excluded were "institutional workers", (appellee is an "institution"), and (c) that such institutions as schools, colleges, the Y. M. C. A., and the like, should be exempt.

The question presented is of general importance. In this country, there are about seven thousand hospitals, ("Vital Statistics-Special Reports, Hospitals and other Institutional Facilities and Services, 1939", Vol. 13, No. 2, p. 7, published by the Bureau of the Census). They are there classified as "non-profit", (2,967), "government" (1,729) and "proprietary" (2,295). The "non-profit" group (much the largest—over forty-two per cent) is stated to embrace "church, fraternal or other association-controlled institutions".

Such "non-profit" hospitals are also of widespread public benefit. For example, the membership of rail-

road hospitals ("association-controlled institutions") probably exceeds half a million. These have long been held charitable, (*Union Pacific R. R. Co. v. Artist*, 8th Circ., 60 Fed. 365, a leading case).

II. But even were it doubtful whether or not Congress intended that non-profit hospitals should be excluded as charitable, appellant's argument proceeds upon too narrow a definition of "charity" and is contrary to the great weight of authority.

It is not the test of an institution's charitable character that it be "organized to receive and dispense charity". In its legal sense, "charity" is much more comprehensive than almsgiving. Any non-profit institution ministering to a fundamental human need (old age, education, sickness, or religious worship) is, per se, a "charity". It is misleading to assimilate such an institution to a "mutual benefit society", which pays benefits in money. The inherent distinction is between the care of the sick without a purpose to make a profit, (immemorially a charity), and the payment of benefits in money.

Even had Congress erred in its view that a non-profit hospital is a charitable institution, its intention and purpose would still control. However, such view is in entire harmony with the overwhelming weight of authority throughout the United States. The test is not whether a hospital's services are rendered without charge, but whether it is operated for private profit. The charitable character of a non-profit institution is not affected by making a charge to defray

cost of operation nor by restriction of benefits to members.

III. No part of appellee's net earnings has ever inured to the benefit of any private shareholder or individual. This is established by numerous authorities. In the court below, counsel for the United States, (Brief, p. 3), after reviewing plaintiff's organization and activities, stated that "therefore, it would follow that plaintiff has qualified itself under the last portion of the exemption quoted above, i.e.,

'the net earnings, no part of which inures to the benefit of any private shareholder or individual.' "

Hence, it becomes unnecessary to consider whether retroactive effect can be given to the Commissioner's reversal, on April 3, 1939, of his ruling of July 14, 1937. It was upon this latter ground (56 Cal. App. (2d) 534, 551-556; 133 Pac. (2d) 47, 55-59) that appellee recovered judgment for (a) employees' taxes which had accrued before the change in the State's ruling and (b) interest on such taxes and on the amount of employer's contributions theretofore accrued, all of which it had paid from its own funds.

There was a like ruling in *Garrison v. State*, 64 Cal. App. (2d) 820, 149 Pac. (2d) 711. *Waterbury Savings Bank v. Danaher*, 128 Conn. 78, 20 Atl. (2d) 455, treats the matter at length. (See also *Bull v. United States*, 295 U. S. 247, 79 L. Ed. 421, 55 S. Ct. 695; *Fromm Bros. v. United States*, 35 Fed Supp. 145, (Wisc. 1940).

Mertens Law of Federal Income Taxation, (1943), Vol. 10, Sec. 60.13, p. 636:

“In several instances the Commissioner or the Collector has been held precluded from adopting a position inconsistent with one previously taken where injustice would result therefrom.”

I.

THE HISTORY OF THE SOCIAL SECURITY ACT CONCLUSIVELY SHOWS THAT CONGRESS INTENDED THAT HOSPITALS “NOT OPERATED FOR PROFIT” SHOULD BE EXCLUDED FROM ITS OPERATION.

The Conference Committee report, while it amply supports the Attorney General’s opinion, merely confirmed what previously appeared.

Sections 1426(b)(8) and 1607(c)(7) of the Internal Revenue Code, and the corresponding sections of the Social Security Act, were taken verbatim from previous fiscal statutes. The same language appears in the Revenue Act of 1916, if not before. Congress, in enacting the Social Security Act, understood that hospitals “not operated for profit” had always been held charitable corporations within the meaning of these sections and intended that this language should continue to have the same meaning.

The intention to exclude “hospitals not operated for profit” was expressly asserted when the Conferees were considering the amendments to the Bill. It was then declared that it was unnecessary to exclude such hospitals, in terms, for the reason that, by the settled

construction of the identical language in the income tax law, they were already within the definition of "charitable" corporations.

The record (Cong.Rec., Vol. 79, Part 10, pp. 11,321 and 11,323, amendments Nos. 15 and 81) shows that, in the sections in question, the Senate had proposed the addition of "or hospital". In conference, however, as the statement of the Managers for the House appended to the Conference Report shows, the Senate receded, for the reason that the words "or hospital" were merely surplusage in view of the settled construction of identical language in the income tax act. Thus, it states:

"The Senate amendment adds to the list of purposes 'or hospital' as a clarifying amendment. The Senate recedes, the conferees omitting this language as surplusage, based on the fact that the Internal Revenue Bureau has uniformly construed language in the income tax laws, identical with that found in the house bill, as exempting hospitals not operated for profit, and also on the fear that the insertion of the words added by the Senate amendment might interfere with the long-continued construction of the income tax law."

Language could not be clearer. The Managers for both the Senate and House intended that hospitals "not operated for profit" should not come within the Act. The only question was as to how this should be accomplished. To this end, the addition of "or hospital" had been proposed by the Senate, but merely as a "clarifying" amendment. Such "clarification",

however, was considered by the Conferees "surplusage", since the language of the House Bill, taken without change from the income tax law, had been "uniformly construed" as "exempting hospitals not operated for profit".

In other words, the Conferees intended, and understood, that, by virtue of the language of the Social Security Act, a non-profit hospital was not liable for the tax, and that it was unnecessary to state this in terms, because it was already established as a result of the settled construction of "identical" language in the income tax law.

Furthermore, the reports of the House Committee on Ways and Means, and of the Senate Committee on Finance, (H.Rep. No.615, Sen.Rep. No.628), each declare that:

1. Over one-fourth of all employees in eligible occupations (that is, 9,389,000 workers) were intentionally excluded from the operation of the Act;

2. Employees of "institutions" were so excluded;

3. Churches, schools and other non-profit educational "institutions", the Y. M. C. A., and other organizations exempt under Section 103(6) of Revenue Act of 1932, (Sec. 101(6) of Revenue Act of 1934), were excluded;

4. The "use to which the income is applied" was "the ultimate test of the exclusion" of charitable corporations, rather than the "source" from which such income is derived.

Thus, in each report (H.Rep. p.15, Sen.Rep. p.27) there appears:

“Total number of gainful workers 48,830,000

Total number of owners, operators, self-employed (including the professions) 12,087,000

Total of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers) 9,389,000

Total number of workers in eligible occupations 27,354,000”

“Institution” is defined (Webster’s New Int. Dict.) as “an established or organized society or corporation”, “an establishment, especially one of a public character or one affecting a community”. In *Estate of Sutro*, 155 Cal. 727, 735, the court quotes the following language from *In re Shattuck’s Will*, 193 N.Y. 446, 86 N.E. 455:

“An ‘institution’ is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object. * * * The use of the word ‘institution’ does not point to a public, as distinguished from a private, organization.”

Not only, however, did each committee report indicate that “institutional workers” were to be excluded,

but in each there twice appears (H.Rep. pp.22, 33, Sen.Rep. pp. 33, 45) an explanation of "charitable", all four being virtually identical. Thus, (H.Rep. p.33):

"Services performed in the employ of religious, charitable, scientific, literary, or educational institutions, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the use to which the net income is applied is the ultimate test of the exemption rather than the source from which the income is derived. For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101 (6) of the Revenue Act of 1932."

The test there indicated, that it is the "use" to which the income is applied, rather than the "source" from which it is derived, is the same as that announced in *Trinidad v. Sagrada Orden*, 263 U. S. 578; 44 S. Ct. 204, 68 L. Ed. 458, (infra. p. 23.)

Congress has treated all hospitals "not operated for profit" alike. The exclusion was not of "free", or "purely charitable", or "non-member", hospitals.

“Fraternal or other association controlled institutions” are not denied the benefit of the exemption. The only test is whether the hospital is “operated for profit”. The Commissioner’s letter to appellee of February 24, 1939, (R. 45-46), states that “it appears you are not operated for profit”.

Doubtless Congress knew that scarcely any hospitals are wholly “free”. Thus, in this state, even county and municipal hospitals do not give “free” service when patients can pay any part of the cost.*

We submit, therefore, that appellee, both as a hospital “not operated for profit” and as a non-profit “institution”, is exempt. Its employees are among the 9,389,000 workers who are to be excluded. The intention of Congress appears beyond doubt.

II.

BY THE GREAT WEIGHT OF AUTHORITY THROUGHOUT THE UNITED STATES, APPELLEE, AS A NON-PROFIT HOSPITAL, IS A CHARITABLE INSTITUTION.

That non-profit hospitals are charitable has long been settled. The opinion of the trial judge cites merely a few of the decisions, (R. 36). Since the intention and purpose of Congress are not doubtful, extended discussion of this point seems unnecessary. We will set forth the controlling principles, the au-

**Welf. & Inst. Code*, Sec. 204; *Goodall v. Brite*, 11 Cal. App. (2d) 540, 54 Pac. (2d) 510, hearing in Supreme Court denied; *Reichle v. Hazie*, 22 Cal. App. (2d) 543, 71 Pac. (2d) 849, hearing in Supreme Court denied.

thorities in support of which mainly appear in the appendix.

1. "Charity" is not limited to "almsgiving" nor to gifts to the poor, but its legal meaning is far more comprehensive. Nor is it limited to any narrow or stated formula, but "is as varying as the wants of humanity", expanding with the advancement of civilization and the increase of human needs. (Appen. A, p. i.)

2. "Charity" represents "both a personal and a social endeavor to ameliorate the conditions which exist in society", (*Enc. Brit.*, 14th (1936) Ed., Vol. 5, p. 248). "It has no necessary relation to relief or alms. It may mean a consideration shown for the welfare of others either individually or generally", (*Id.*), and "the Christian maxim rightly understood, 'loving one's neighbor as oneself', sets the standard of charity", (*Id.* p. 249).

Ould v. Washington Hospital, 95 U. S. 303, 311, declares that a charitable use refers to "almost anything that tends to promote the well-doing and well-being of social man". Thus, a non-profit hospital, though not confined to the poor, is a public charity, (*Buchanan v. Kennard*, 234 Mo. 117, 139, 136 S. W. 415, Ann. Cas. 1914D 50).

In 3 *Paul & Mertens on Federal Income Taxation*, p. 582, Sec. 32.19, "charity" is defined as "a gift, act or service for the benefit of an indefinite number of persons."

Restatement, Trusts, Sec. 368:

“Charitable purposes include

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the promotion of health;
- (e) government or municipal purposes;
- (f) other purposes the accomplishment of which is beneficial to the community.”

Accord:

Pennsylvania Co. v. Helvering, 66 Fed. (2d) 284, (Ct. App. Dist. Col.)

Stuart v. City of Easton, 3rd Circ., 74 Fed. 854,

Ettlinger v. Trustees of Randolph-Macon College, 4th Circ., 31 Fed. (2d) 869,

Long v. Rosedale Cemetery, 84 Fed. 134, 136,

Harrison v. Barker Annuity Fund, 7th Circ., 98 Fed. (2d) 286,

Darcy v. O'Brien, 65 Fed. (2d) 599, (Ct. App. Dist. Col.)

Gossett v. Swinney, 8th Circ., 53 Fed. (2d) 772, 776,

Todd v. Citizens' Gas Co., 7th Circ., 46 Fed. (2d) 855,

Union & New Haven Trust Co. v. Eaton, 20 Fed. (2d) 419, 421, (D. C. Conn.)

International Reform Ass'n. v. District Unemployment Compensation Board, 131 Fed. (2d) 337, (Ct. App. Dist. Col.)

Santa Fe Lodge No. 460 B. P. O. E. v. Employment Security Commission, 159 Pac. (2d) 312, (New Mex., May 1945).

Appellee, with its present equipment and facilities, is the result of the acts of its founders in establishing it, of its members in continuing to maintain it, and of the gifts and legacies it has received, so that there now exists an institution whose membership is unlimited, which "tends to promote the well-doing and well-being" of the community as a whole. The test of appellee's charitable character is whether it acts for profit, and the benefit derived by the community from its activities.

3. By the overwhelming weight of authority throughout the United States, a non-profit hospital is, per se, a charitable institution. (Append. B, p. ii.)

4. The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, donor or settlor is immaterial. (Append. C, p. v.)

Whatever may have been the expectations or motives of appellee's members as they may be from time to time, there has come into existence, largely from donations and bequests, an institution which, without profit and at a charge of less than half its actual outlay, not only affords complete protection to the health of nearly ten thousand persons, but also stands ready similarly to care for all others complying with its simple and non-exclusive requirements for admission.

5. That a non-profit institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a non-profit school or hospital makes a charge to defray the cost of its operation, does not affect the charitable character of such institution. (Append. D, p. vi.)

6. The restriction of benefits to its own members does not affect an institution's charitable character. Especially is this true where the membership is very large and new members are accepted. (Append. E, p. vii.)

If these principles establish appellee to be a charitable institution, it cannot be material whether a "mutual benefit society" also is charitable.

The distinction between non-profit hospitals and mutual benefit societies.

Zollmann on Charities, p. 188:

"A hospital association not conducted for profit, which devotes all its funds, including those received from patients, exclusively to the maintenance and improvement of the institution is, therefore, a charity in every sense of the word and has been recognized as such by numerous cases".

Bogert on Trusts, Vol. 2, pp. 1123-24:

"A trust to pay money to members or their relatives, regardless of their need or of the effect of the trust upon the recipients, cannot be charitable. The trust must be to aid members or others who are in want, sickness, or in other condition where they can receive charitable benefits. A few

cases which have denied that trusts for the members of such societies are charitable can be explained on this ground. They were merely trusts to give pecuniary advantages to members or their nominees. They were organizations for social and savings purposes, with no necessary element of the relief of poverty or distress."

Scott on Trusts, (1939), Vol. 3, Sec. 372.1, p. 1997:

"An institution to promote health, however, is charitable although it is a private institution, provided that it is not one the profits of which inure to the benefit of any individual".

Id. Sec. 372.2, p. 1998:

"A trust for the promotion of health may be charitable although the persons to receive the benefits are of a limited class, if the class is not so small that the purpose is not of benefit to the community. Thus a trust to establish a hospital for the employees of a particular railroad is upheld as charitable."

Id. Sec. 376, pp. 2032-33:

"A trust to establish or maintain an institution may be charitable, however, although it is provided that some or all of the persons to receive benefits from the institution are to pay fees or otherwise contribute to the expense of maintaining the institution. It has been so held in numerous cases of educational institutions and hospitals and homes. The question is not whether the institution may receive a profit, but what disposition is to be made of the profit, if any, which may be received."

14 *Corp. Jur. Secun.* p. 419:

“Voluntary, unincorporated associations, organized to promote some purpose beneficial to the general public or of certain classes thereof are charitable societies or institutions and are subject to the rules applicable to such societies. In so far as a benevolent association has for its object the conferring of benefits without requiring an equivalent from the one benefited, it may be a charity”.

We submit, therefore, that it is immaterial whether a non-profit hospital resembles in any respect a mutual benefit society,* and that appellee is a charitable corporation.

III.

NO PART OF APPELLEE'S NET EARNINGS HAS EVER INURED TO THE BENEFIT OF ANY PRIVATE SHAREHOLDER OR INDIVIDUAL.

The authorities to this effect are numerous. We will first show that, in fact, no part of appellee's net earnings has ever so inured.

1. Congress has itself construed the clause, “no part of the net earnings of which * * *”, as embracing hospitals “not operated for profit”. This follows (a) from the statement in the Conference report that the Internal Revenue Bureau had “uniformly con-

*Some authorities, however, have held such societies to be charitable, (*Pease v. Pattinson*, L. R. 32 Ch. Div. 154; 55 L. J. Ch. N.S. 617, 54 L.T.N.S. 209; *Spiller v. Maude*, L. R. 32 Ch. Div. 158, 11 L.T.N.S. 399; *In re Buck*, (1896) 2 Ch. 727).

strued ["identical"] language in the income tax laws as exempting hospitals not operated for profit", and (b) from the declared intention of Congress that the same language in the Social Security Act should have the same meaning. In other words, Congress considered that the net earnings of a non-profit non-stock hospital do not inure to private gain.

2. The destination of the income, and not its source, governs.

3. "Net earnings" refers to the corporation's earnings as a whole. The statute does not treat it as departmentalized nor as divided into independent income-producing units.

4. Under the rules of *ejusdem generis* and *noscitur a sociis*, "individual", in the phrase "any private shareholder or individual", means one having a proprietary or pecuniary interest peculiar to himself. It contemplates operations for profit, but forbids that such profits should inure to any "private" shareholder or individual. Hence, to defeat the exemption, net earnings must inure to the "private" advantage of one or more of the group, as distinguished from the benefits to the group generally. The right of appellee's members is to be cared for in sickness, but not to its earnings or to any other asset. This is not a property right, but only usufructuary. It is "merely the right to the use thereof as long as he continues to be a member", (10 Corp.Jur. Secun. 297).

5. The income tax law affords an analogy. "Income" derived from property must be something

“severed” from “capital” and received or drawn by the recipient for his separate use, benefit and disposal. (*Eisner v. Macomber*, 252 U.S. 189, 40 Sup. Ct. 189). Similarly, “net earnings” do not “inure” to the benefit of a “private shareholder or individual” until they are first “severed” from the general fund so as thereby to afford to such person a benefit special and peculiar to him. The distinction indicated by the clause, “no part of the net earnings of which inures to the benefit of any private shareholder or individual”, is between (a) assets retained by the institution in its organized capacity, and (b) persons privately and individually benefited. As long, however, as unsevered net earnings are held as a part of the fund for the benefit of the whole group, (here, one having a very large and an unlimited membership), so as to promote those socially beneficial purposes which are the basis for the exemption, there is no “private” advantage to any single member of that group.

“Exclusively” in the clause, “organized and operated exclusively”, modifies “organized and operated”. It refers to the “purpose” of the institution. The rendering of services gratuitously is not the test of an institution’s “purpose”. The act does not say “exclusively charitable”.

The clause, “no part of the net earnings * * *”, is the equivalent of “non-profit”. As said in *Mertens, Law of Federal Income Taxation*, Vol. 10, Sec. 60.13,

p. 636, it is "independent of the other tests, it operates regardless of the fact that the purposes may be religious, educational or literary."

The section specifies five "purposes", viz.: "religious, charitable, scientific, literary and educational". A school may be operated for profit, and yet be exclusively "educational", (*Kemper Military School v. Crutchley*, 274 Fed. 275). A society of book lovers is "literary", or one of scientists is "scientific", though their facilities are not free to the general public, (*United States v. Proprietors of Social Law Library*, 1st Circ., 102 Fed. (2d) 481). A church congregation is "religious", though its benefits are reserved primarily to its paying members, (*Estate of Lubin*, 186 Cal. 326).

A charitable "purpose" (e.g., the treatment of the sick without profit) is not altered by the receipt of rents or other income or by payments by non-member patients. "Such activities are mediate to the primary purpose", (L. Hand, J., in *Slee v. Commissioner*, 2nd Circ., 42 Fed. (2d) 184).

By using income from its surplus facilities (receipts from non-member patients) to reduce its overhead and to afford an unlimited membership better service and at lower rates, a non-profit institution—whose purpose is the relief of the sick and whose funds and revenues are devoted exclusively to that purpose—does not alter its character as a hospital "not operated for profit", but thereby furthers that primary purpose which the exemption seeks to foster.

The operation of a non-profit hospital, whose services are available to all, is itself a charitable purpose. Such receipts do not inure to any "private" shareholder or individual.

The Authorities.

Trinidad v. Sagrada Orden de Predicadores,
263 U.S. 581, 68 L.Ed. 458, 44 S. Ct. 204.

Corporation sole, representing a religious order, received income by way of rents, interest, dividends, and profits on small quantities of supplies sold to its agencies. The language of the statute was identical to that here involved. Held, exempt.

"Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

"Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit."

At page 582:

“In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit.”

“Financial gain is not the end to which they are directed.”

Id.

Commissioner of Internal Revenue v. Kensico Cemetery, 2nd Circ., 96 Fed. (2d) 594, 596

Membership cemetery corporation deriving profits from the sale of burial plots and incidental services, which were devoted to the payment of its debts and to cemetery's maintenance and improvement, held, exempt.

“The argument that net earnings may be distributed not in cash but in intangible values as the improvement of the remaining lots (by the embellishment of the cemetery) is without merit. While the improvements might enhance the value of the unsold lots and increase the prices received therefor to the advantage of the land certificate holders, still, one of the purposes which justifies the exemption of a cemetery is such acquisition, improvements and embellishment of burial grounds.

* * * Here the cemetery's revenues resulted from and were devoted to the purposes for which the statute desires them to be exempt and this applies not only to revenues immediately applied to maintenance and improvement of the burial grounds, but to the revenues accumulated for such purposes. The cemetery is devoted to a public

purpose which the tax law aims to protect and it is not operated for profit. *Trinidad v. Sagrada*, 263 U.S. 578, 44 S. Ct. 204, 68 L. Ed. 458. The respondent is owned and operated exclusively for the benefit of its members and therefore is exempt."

Roche's Beach, Inc. v. Commissioner of Internal Revenue, 2d Cir., 96 Fed. (2d) 776, 779

Corporation organized by testator to operate his property and to pay income to testamentary charitable foundation, exempt from income tax as corporation organized and operated exclusively for charitable purposes.

"No reason is apparent to us why Congress should wish to deny exemption to a corporation organized and operated exclusively to feed a charitable purpose when it undoubtedly grants it if the corporation itself administers the charity. We think the language is adequate to describe both types."

United States v. Proprietors of Social Law Library, 1st Circ., 102 Fed. (2d) 481, 484

The Social Law Library was incorporated by special act. Its facilities were open to all citizens of Boston willing to aid in its upkeep by becoming a "proprietor" or "subscriber", and were also free of charge to certain State and Federal officials. Held, charitable.

"The contention of the government that the net earnings of the Social Law Library inure to the benefit of the shareholders or individuals, be-

cause any improvements of the Library rendering it more serviceable to its members is of special benefit to them; but though every improvement in a charitable institution confers additional benefits on those using it, or availing themselves of its benefits, such benefits have never been considered as taking the institution out of the class of charitable institutions because it has enabled it to do better educational, literary or charitable work, or because it resulted in distributing its benefits among private shareholders or individuals."

Commissioner v. Chicago Graphic Arts Federation, 7th Cir., 128 Fed. (2d) 444.

"Any business in which respondent had engaged of a kind ordinarily carried on was only incidental or subordinate to its main or principal purpose."

Santee Club v. White, 5th Cir., 87 Fed. (2d) 5, 7

Recreation club not taxable on profits realized on sale of small unusable portion of its property, profits inuring to members through use of club's facilities not being "benefit" within meaning of income tax law.

"No part of the profit on the sale of real estate in question inured to the benefit of the Club's shareholders except through their use of the Club facilities, which is clearly not the benefit referred to in the exempting clause of the statute."

Koon Kreek Klub v. Thomas, 5th Circ., 108
Fed. (2d) 616, 618

Club leased grazing privileges on its game preserve, also granted oil lease on its entire property for present cash consideration and annual renewal rental. Proceeds used to pay off mortgage on property. Held, exempt.

“The exemption applies to profits so long as they are retained by the organization or used to further the purposes which are made the basis of the exemption, and are not otherwise used for the benefit of any private shareholder.”

There was a like ruling, under similar circumstances, in *Scofield v. Corpus Christi Golf & Country Club*, 5th Circ., 127 Fed. (2d) 452.

Crooks v. Kansas City Hay Dealers' Ass'n.,
8th Circ., 37 Fed. (2d) 83, 87

That, on final dissolution, accumulated profits would go to individual members, does not defeat exemption.

“If the Association were organized for profit that ultimate possible division of a surplus might be sufficient to justify the exclusion of the Association from the exempted class. Such a remote contingency, however, in my judgment, with an association not organized for profit, was not intended to destroy the privilege of exemption.”
(Quoted from trial judge's opinion.)

Oklahoma State Fair and Exposition v. Jones,
(D.C.Okla.) 44 Fed.Supp. 630 (1942)

Receipts from vaudeville, rodeo and other shows held not to defeat plaintiff's exemption as an exclusively educational and scientific institution:

“The case would seem to turn upon the construction of the word ‘exclusively’ in the light of the facts developed. Plaintiff relies strongly upon the principle promulgated in *Trinidad v. Sagrada Orden*, 263 U.S. 578, 44 S. Ct. 204, 68 L.Ed. 458. * * *

“*Roche’s Beach v. Commissioner*, 2 Cir. 96 Fed. (2d), 776, is cited as a case of similar construction where the term ‘exclusively’ was used in defining tax liability. * * * In both of the foregoing cases it was held that the greater emphasis should be placed upon the destination of the income for construction purposes.

“Some of the other cases cited are *Sand Springs Home v. Commissioner*, 6 B. T. A. 198; *Koon Kreek Klub v. Thomas, Collector*, 5 Cir., 108 F. (2d) 616, which also adhere to the same line of reasoning.”

City Club of Milwaukee v. United States, (D.C. Wisc.) 46 Fed. Supp. 673 (1942)

Nonstock nonprofit corporation, formed for the study of municipal affairs, the acquisition and dissemination of accurate information concerning them, and generally to promote better social, civic and economic conditions, operated a restaurant, candy and cigar counter, for members’ convenience, and a small profit was made each year from the operation of a candy and cigar counter. *Held*, plaintiff entitled to recover Social Security taxes and that exempting clause should be

“given a liberal construction so that the purposes of the provision to favor and encourage such organization is carried out.”

See also *Linderman v. Driscoll*, 26 Fed.Supp. 565, (D.C.Pa.)

Anderson Country Club, Inc., 2 T.C. 1238

Taxpayer's golf course and club house had been located on leased land. Upon expiration of lease it became necessary to buy lessor's entire tract, including some acreage unsuitable for golf course. Taxpayer, being unable to sell this unusual acreage as a whole, it was sold in small tracts over a period of years, at considerably in excess of cost. *Held*, excess did not inure to benefit of members as private gain.

"The respondent's regulations recognize the fact that an incidental sale of property does not extinguish the right to an exemption. Considering 'incidental' in its ordinary sense to mean collateral or subordinate to the principal purpose, we think there is ample evidence that the sales in question were incidental to the primary reason for the club's existence."

Unity School, 4 B. T. A. 61

A corporation, otherwise exempt from taxation, does not lose exemption because it carries on profitable or competitive activities in furtherance of its predominant purpose. Opinion rejects claim that there were "several departments" of corporation, each of which were to be separately considered:

"The inquiry must always be whether all the activities of the organization are devoted to furthering its predominant religious, charitable, scientific or educational purpose. * * * If these purposes or any of them are the controlling reasons for the corporation's existence and all things

are devoted by it to that end, the Congressional purpose of exemption, 'made in recognition of the benefit which the public derives', should not be defeated because its incidental features are to some extent profitable."

This case was followed in *Forest Lawn Memorial Park Ass'n.*, 45 B. T. A. 1091, 1103, which also cites the *Kensico Cemetery* case.

District of Columbia v. Mt. Vernon Seminary,
100 Fed. (2d) 116, 118, (Ct.App.D.Col., 1938)

An act exempted from taxation "property used for educational purposes that is not used for private gain". Plaintiff's property was all used for educational purposes. No excess of receipts over expenditures had gone to incorporators or to any contributor to endowment.

"The term 'private gain' as used in the statute, has reference only to gain realized by any individual or stockholder who has a pecuniary interest in the corporation and not, as appellant contends, to profits realized by the institution but turned back into the treasury or expended for permanent improvements. See *Commonwealth v. Trustees Hamilton College*, 125 Ky. 329, 101 S.W. 405. It is the evident intention of the statute to exempt all institutions, educational in nature, which are not commercial in their purpose.

"Congress has recognized the fundamental difference between income earned by an educational institution which is diverted into private use, and similar income which is dedicated to the continued improvement of the institution. The latter

is a highly desirable use from the public point of view and equally worthy of tax exemption as the property out of which the income was produced.”

King County Insurance Association, 37 B. T. A.
288, 292 (1938).

Membership of trade association was composed of agents of various insurance companies. To help meet its overhead expenses, members turned over to it business of writing policies upon certain public risks, thereby reducing their dues. *Held*, no part of such earnings inured to their benefit.

“The evidence shows, too, that no part of the net earnings ever inured to the benefit of any private individual. The income from the public business, as above stated, merely served to reduce the amount of the dues. No member ever received, ever expected to receive, or ever had any possibility of receiving, back from the petitioner in any year an amount greater than or even equal to his advances to the petitioner for such year.”

Waynesboro Manufacturing Ass’n., 1 B. T. A.
911, 914

Non profit corporation, which held contracts with coal mining companies giving it election to purchase coal at specified price, and which resold to its members and others at a small profit, held exempt:

“It had earnings, but the Supreme Court in the *Trinidad* case clearly said that Congress contemplated this and that net income does not take the organization out of the statute. We think the taxpayer is a business league not organized for profit. * * *

“Actual distribution to any individual defeats the exemption. Here, however, the Commissioner agrees that the taxpayer retained for its own use its earnings. No part thereof inured to the benefit of any individual. Thus the statutory qualifications are fully met.”

We submit, therefore, that none of appellee's net earnings have ever inured to the benefit of any private shareholder or individual.

IV.

THE AUTHORITIES CITED BY APPELLANT.

Zollmann on Charities, pp. 143-144:

The inapplicability of this has been shown, (supra, p. 17).

Employees Benefit Association v. Commissioner, 14 B. T. A. 1166

Members' dues held to be taxable income.

Philadelphia & Reading Relief Ass'n., 4 B. T. A. 713, 728

“The Association agrees to pay a definite sum in the cases specified.”

Pontiac Employees Mutual Benefit Ass'n. v. Commissioner, 15 B. T. A. 74

Follows preceding case.

Coe v. Washington Mills, 149 Mass. 543, 21 N.E. 966
Voluntary association of employees, who paid weekly contributions. Sick members were paid a weekly allowance.

In re Kennedy's Estate, 269 N. Y. Supp. 136,

Bequest to nurses' alumnae association formed to promote social intercourse. Compared by court to mutual benevolent association. Charitable aid to distressed members merely incidental to main purpose.

In the next three cases, the corporation was held to be an adjunct or instrumentality for the benefit of private institutions for profit.

Northwestern Municipal Ass'n. v. United States, 99 Fed. (2d) 460, 463

Association formed by and as instrumentality of group of banks and investment firms, held, not a "civic league" but "mere adjunct" for its founders' benefit, any public benefit being "incidental".

Uniform Printing & S. Co. v. Commissioner, 33 Fed. (2d) 445

Taxpayer was organized by insurance companies to do their printing and furnish them supplies at actual cost. Prices later raised to cover expected expenditures for improvements and additions. Held, that taxpayer was not a "business league" and that profits thus realized were taxable income.

Northwestern Jobbers' Credit Bureau v. Commissioner, 8th Circ., 37 Fed. 880

Taxpayer's activities included "lines of work ordinarily performed by mercantile agencies, trust companies, attorneys at law, credit men and collection agencies", (p. 882), all of which were "valuable and reasonably necessary to the proper conduct" of its shareholders' business, (p. 883).

Donnelly v. Boston Catholic Cemetery Ass'n.,
146 Mass., 166, 15 N. E. 505

holds defendant to be subject to "ordinary civil liabilities" for allowing an unauthorized interment in plaintiff's plot.

Hassett v. Associated Hospital Service Corporation, 125 Fed. (2d) 611, did not involve a hospital of any kind. It seeks to distinguish *United States v. Proprietors of Social Law Library*, 102 Fed. (2d) 481, and is fully considered in the trial judge's opinion (R. 34-35), which states:

"Plaintiff has all the attributes of the Social Law Library which are mentioned as points of distinction between the Library case and Hassett case."

The opinion (R. 35) also considers *In re Farmers' Union Hospital Ass'n. of Elk City*, 190 Okla., 661, 126 Pac. (2d) 244.

La Societe Francaise v. California Employment Commission, 56 Cal. App. (2d) 534, 133 Pac. (2d) 47.

After stating (p. 542) that "charity", when used in a statute, "must be defined in conformity with the purpose or intention of the lawmakers", the court declared:

"We are unable to agree with appellant as to the view, purpose and intent of Congress, that hospitals not operated for profit are charitable institutions."

This singular result was reached without any reference to or discussion of the legislative history of the Social Security Act, which had been strongly urged in the briefs,* but which the opinion pointedly ignored. The opinion follows the *Hassett* case.

The opinion (p. 542) announces the test, that "the hospital is operated for no other purpose than that of dispensing charity". This is contrary to all the authorities, including the later California case of *Scripps Memorial Hospital v. California Employment Commission*, 24 Cal. (2d) 669, 151 Pac. (2d) 109.

Moreover, while the court (p. 542) declared that the briefs contained "very little comment" on the "exact language" of the State Act—identical with that of the Federal Act—it similarly ignored the numerous decisions** establishing the meaning of the clause, "no part of the net earnings * * *".

The language of the same court (*Carpenter v. City of Santa Monica*, 63 Cal. App. (2d) 772, 147 Pac. (2d) 964, 971), is, therefore, directly applicable:

"It is elementary, of course, that a decision which fails to consider a point of law cannot be considered an authority on that point." (citing cases)

Smith v. Reynolds, 43 Fed. Supp. 510.

This case (a) fails to consider the history of the Social Security Act, (b) is contrary to *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365, decided in the Circuit

*At pp. 47-54 of the Opening Brief in that case, (supra, pp. 8-12).

**At pp. 179-189 of said Opening Brief, (supra, pp. 23-32).

of which Minnesota is a part, (c) ignores numerous decisions holding railroad and like hospitals to be charitable, and (d) disregards the distinction between the treatment of the sick and payment of benefits in money. There was no appeal.

However, appellee comes within its definition of "charitable", (p. 513):

"A charitable institution is one established maintained and operated for the purpose of taking care of the sick, without any profit or view of profit, but at a loss which has to be made up by benevolent contributions".

But for the gifts and donations received by appellee, it could not have acquired, nor now maintain, its present hospital and plant nor afford the facilities which it furnishes, since monthly dues and admission fees would have been insufficient, (R. 39).

The opinion (p. 513) states:

"The member is entitled to the benefits as a matter of right, so long as he pays the dues required of him. But if he should fail to pay the monthly assessment or dues, his membership in the Association is automatically forfeited, along with any rights to the benefits provided for in the by-laws."

This is not here true, (supra p. 2.)

The test cannot be that, upon payment of dues, a member is "entitled" to benefits as a matter of "right". That a non-profit school, hospital or home makes a charge against pupils, patients, or inmates to

help defray the cost of its operation, does not affect its charitable character, (*supra* p. 17), notwithstanding that such persons acquire enforceable rights. "The income thus derived is used only to maintain the institution", (*Estate of Henderson*, 17 Cal. (2d) 853, 868, 112 Pac. (2d) 605).

Thus, though the pupil in *Estate of Bailey*, 19 Cal. App. (2d) 135, 65 Pac. (2d) 102, or the inmate (*Henderson* case) who assigned his assets to the Home, doubtless acquired "rights", the school or the Home was a charity. Here, such "right" is merely one to treatment, (*supra* p. 20).

Morrow v. Smith, 145 Iowa, 514, 124 N. W. 319
 "The only measure of his right is the pressure of his need. This is the domain and the function of charity as commonly understood".

Union Pacific Railway Co. v. Artist, 8th Circ.,
 60 Fed. 365,

"Any one of these employees could compel application of this fund to the purposes for which it was collected".

In *Lutheran Hospital Ass'n. v. Baker*, 40 S. D. 226, 167 N. W. 148, and *German Hospital v. Board of Review*, 233 Ill. 246, 84 N. E. 215, (hospital held charitable), payment of contributions entitled the payors to a corresponding credit on hospital bills.

Hence, we submit, the acquisition of "rights" by a pupil, patient or inmate is not the test of charitable character.

Nor can such test be the time or manner of payment, that is, whether such person (a) makes a single payment in advance, or (b) later pays in installments. Appellee cannot, at the same time, be both charitable and non-charitable, that is, charitable as to prepaying life members, and non-charitable as to those paying monthly dues.

We submit, therefore, that in the case of a non-profit institution of widespread social value ministering to a fundamental human need, the test of its "charitable" character is not whether a member acquires enforceable "rights" nor the fact, time or manner of payment.

CONCLUSION.

In conclusion, we submit:

Appellee is a non-profit charitable institution (a) founded, by donations, to treat the destitute sick; (b) whose only activity is the operation of a non-profit hospital; (c) whose plant and facilities have been largely acquired by testamentary and other gifts, and which has received, in times of stress, other public support, (R. 169-172); (d) which is maintained, but only in part, by members' dues and admission fees; (e) whose membership is unlimited, which receives new members, and whose requirements for admission are simple and non-exclusive; (f) which seeks to treat as many of the sick as it can, to give them adequate and complete treatment, and for the lowest amount it

can charge, all of which it does, not for profit, but to benefit a large and indefinite part of the community; (g) which has set up a relief fund to pay the dues of needy members, to whom it also furnishes, without charge, such additional facilities as may be required; (h) maintains an Old People's Home for elderly members, to which they are admitted either without charge or on a non-profit basis, and (i) renders to the public at large other forms of gratuitous relief.

Appellee protects the health of nearly ten thousand persons, the great majority of whom must be of moderate means, and many of whom, in case of serious illness, would otherwise have to be cared for by the public. By early consultations and treatment, it forestalls what might develop into serious illnesses, and thereby aids in diminishing members' unemployment and the suffering and privation to members and others resulting therefrom. For nearly a century, it has rendered services of wide-spread public benefit. In case of war or public calamity, its facilities are available.

Appellee could not give entirely free service. Donations are uncertain, both in time and amount. It very early appeared that it could continue its activities only through members' regular contributions, which, however, have been kept as low as possible.

The regular and hard-earned contributions of the poor are as deserving as the bounty of the rich. Only a spirit of solidarity and of mutual helpfulness has enabled this large group to endure. Selfish motives of gain never would have been sufficient. The purpose to

join with one's fellow-creatures in an effort to relieve against a common affliction of mankind is not one to make a gain, nor can more effective application be given to the precept, "All things whatsoever Ye would that men should do to you, do you even so to them; for this is the law and the prophets."

Appellee's reserves, carefully husbanded for the purpose of keeping pace with needed improvements and advancements in medical science, would be endangered, were it to be held that in the operation of its hospital it is on a parity with those whose activities are conducted for profit. Money needed for improvements would be used to pay taxes. The imposition of the tax upon appellee is subversive of the public policy expressed in the legislation here involved, for the exclusion of hospitals "not operated for profit" does not grant a special privilege but recognizes that they are indeed public institutions rendering a service of benefit to the entire community.

It is respectfully submitted that the judgment appealed from should be affirmed.

Dated, San Francisco, California,

October 8, 1945.

Respectfully submitted,

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(Appendices A, B, C, D and E Follow.)

Appendix A

“Charity” is not limited to “almsgiving” nor to gifts to the poor, but its legal meaning is far more comprehensive.

Bogert on Trusts, Vol. 2, pp. 1163-4;

Gossett v. Swinney, 53 Fed. (2d) 772, 776;

Old Colony Trust Co. v. Welch, 25 Fed. Supp. 45, 58 (D.C.D. Mass. 1938);

Harrison v. Barker Annuity Fund, 98 Fed. (2d) 286 (C.C.A. 7th);

Darcey v. O'Brien, 65 Fed. (2d) 599 (Ct.App. Dist.Col.);

Powers v. Massachusetts Homeopathic Hospital, 101 Fed. 896 (Cir.Ct.Mass.);

14 *Corp. Jur. Secun.* 411;

Wilson v. First National Bank, 164 Ia. 402, 145 N.W. 948;

Donohugh's App., 86 Pa. 312;

Buchanan v. Kennard, 234 Mo. 117, 136 S.W. 415, Ann. Cas. 1912 D, 50;

People v. Morton, 373 Ill. 72, 25 N.E. (2d), 504;

State v. Board of Control, 85 Minn. 165, 88 N.W. 533;

5 *Cal. Jur.* 2-3;

Estate of Henderson, 17 Cal. (2d) 853, 857;

People v. Cogswell, 113 Cal. 129, 137;

Collier v. Lindley, 203 Cal. 641, 648;

Dingwell v. Seymour, 91 Cal. App. 483, 498;

International Reform Fed. v. Dist. Unemployment Comp. Board, 131 Fed. (2d) 337.

Appendix B

AUTHORITIES HOLDING NON-PROFIT HOSPITALS TO BE PER SE CHARITABLE INSTITUTIONS.

- Buchanan v. Kennard*, 234 Mo. 117, 139, 136 S.W. 415, Ann. Cas. 1912D 50.
- In re Mendelsohn*, 262 App. Div. 605, 31 N.Y.S. (2d) 435, 440 (social security tax).
- Commissioner of Internal Revenue v. Battlecreek Inc.*, 126 Fed. (2d) 405, (income tax).
- In re Rust's Estate*, 168 Wash. 344, 12 Pac. (2d) 396, 398 (1932), (Exemption from taxation).
- New England Sanitarium v. Inhabitants of Stoneham*, 205 Mass. 335, 91 N.E. 385, 387, (1910), (Exemption from taxation).
- People v. Sexton*, 267 App. Div. 736, 48 N.Y. Supp. (2d) 201 (exemption from taxation).
- Scripps Memorial Hospital v. California Employment Commission*, 24 Cal. (2d) 669, 151 Pac. (2) 109. (Social Security tax).
- Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N.W. 699.
- Magnuson v. Swedish Hospital*, 99 Wash. 399, 169 Pac. 828, 830, (1918).
- Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 173 A. 209, 212, (1934), (Exemption from taxation).
- Hearns v. Waterbury Hospital*, 66 Conn. 98, (1895), 33 Atl. 595.
- Lutheran Hospital Ass'n. v. Baker*, 40 S.D. 226, 167 N.W. 148 (1918), (Exemption from taxation).

- State v. H. Longstreet Taylor Foundation*, 198 Minn. 263, 269 N.W. 469 (1936), (Exemption from taxation).
- German Hospital v. Board of Review*, 233 Ill. 246, 84 N.E. 215. (Exemption from taxation).
- Barnes v. Providence Sanitarium*, 229 S.W. 588, (Tex.Civ.App.)
- County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 A.R. 298, (Exemption from taxation).
- Maretick v. South Chicago Community Hospital*, 297 Ill. App. 488, 17 N.E. (2d) 1012, 1013.
- Union Pacific Railway Co. v. Artist*, 60 Fed. 365, (C.C.A. 8th, 1894), (Railroad hospital).
- Texas Central R. Co. v. Zumwalt*, 103 Texas 603, 132 S.W. 113, 30 L.R.A. (N.S.) 1206, (Railroad hospital).
- Carr v. Northern Pacific Beneficial Ass'n.*, 128 Wash. 484, 221 Pac. 981.
- Richardson v. Carbon Hill Coal Co.*, 10 Wash. 656, 39 Pac. 95.
- Wells v. Ferry Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L.R.A. (N.S.) 426.
- Barden v. Atlantic Coastline Ry. Co.*, 152 N.C. 318, 67 S.E. 971.
- Thomas v. Postal Telegraph-Cable Co.*, 48 S.W. (2d) 422, (Ct. Civ. App. Tex. 1930).
- Galveston H. & S. Ry. Co. v. Hanway*, 57 S.W. 695, (Ct. Civ. App. Tex. 1900).
- Southern etc. Sanitarium v. Wilson*, 45 Ariz. 522, 46 Pac. (2d) 118, 125, 77 Pac. (2d) 458.

- Bedford v. Colorado Fuel & Iron Corp.*, 102 Colo. 538, 81 Pac. (2d) 752, 759.
- Miller v. Mohr*, 198 Wash. 619, 89 Pac. (2d) 807.
- McDonald v. Mass. Gen'l Hospital*, 120 Mass. 432, 21 Am. Rep. 529.
- Reynolds Memorial Hospital v. Marshall County Court*, 78 West Va. 685, 90 S.E. 238 (1916).
- Enell v. Baptist Hospital*, 45 S.W. (2d) 395 (Tex. Civ. App. 1931).
- City of Palestine v. Missouri-Pacific Lines H. Ass'n.*, 99 S.W. (2d) 311, (Ct. Civ. App. Tex. 1936).
- Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211 (1939).
- Rush Hospital Benev. Ass'n. v. Board of Sup'rs.*, 187 Miss. 204, 192 So. 829 (1940).
- Piedmont Memorial Hospital v. Guilford County*, 218 N.C. 673, 12 S.E. (2d) 265.
- Virginia Mason Hospital v. Larson*, 9 Wash. (2d) 284, 114 Pac. (2d) 976, (social security tax).
- Beverly Hospital v. Early*, 292 Mass. 201, 197 N.E. 641, 100 A.L.R. 1332.
- City of Dallas v. Smith*, 130 Tex. 225, 107 S.W. (2d) 872.
- Illinois Central R. Co. v. Moodie*, 23 Fed. (2d) 902 (C.C.A. 5th).
- Scott on Trusts* (1939), p. 1996.
- Zollman on Charities*, p. 188.
- Trusts, Restatements*, Sections 372, 376.
- Bogert on Trusts* (1935), Vol. 2, p. 1163.

Appendix C

The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, a donor or settlor is immaterial.

- Bogert on Trusts*, Vol. 2, pp. 1126-7;
Fire Insurance Patrol v. Boyd, 120 Pa.St. 624,
 6 A.S.R. 745, 750, 1 L.R.A. 417;
*Fordyce & McKee v. Women's Christian Nat.
 Library Ass'n.*, 79 Ark. 550, 96 S.W. 155;
Harrison v. Barker Annuity Fund, 98 Fed.
 (2d) 286;
Union Pacific Railway Co. v. Artist, 60 Fed.
 365 (C.C.A. 8th, 1894);
Parsons v. Childs, 345 Mo. 689, 136 S.W. (2d)
 327, 332; Cert. den. 310 U.S. 640;
*Old Colony Trust Co. v. O. M. Fisher Home,
 Inc.*, 301 Mass. 1, 16 N.E. (2d) 10 (1938);
Westport Bank & Trust Co. v. Fable, 126 Conn.
 665, 13 Atl. (2d) 862, 866 (1940);
Noel v. Olds, 78 U.S. App. Dist. Col. 155, 159;
 138 Fed. (2d) 581, 585;
Estate of Coleman, 167 Cal. 212, 138 Pac. 992.

Appendix D

That an institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a school or hospital makes some charge to help defray the cost of its operation, does not affect the charitable character of such institution.

Bogert on Trusts, pp. 114-115;

Scott on Trusts (1939), p. 2032;

Estate of Lowe, 326 Pa. 375, 192 Atl. 405, 111 A.L.R. 518 (1937);

People v. Morton, 373 Ill. 72; 25 N.E. (2d) 504 (1940);

Little v. City of Newburyport, 210 Mass. 414, 96 N.E. 1032;

In re McDowell, 217 N.Y. 454, 112 N.E. 177;

In re Y. M. C. A. Retirement Fund Inc. 18 B. T. A. 139;

Episcopal Academy v. Phila., 150 Pa. 565, 573;

Summers v. Chicago Title & Trust Co., 335 Ill. 564, 167 N.E. 777;

Andrews v. Young Men's Christian Association, 226 Iowa 374, 284 N.W. 186 (Iowa 1939).

Appendix E

The restriction of benefits to its own members does not affect a nonprofit institution's charitable character.

Bogert on Trusts, Vol. 2, pp. 1124-25;

Hibernian Benevolent Society v. Kelly, 28 Ore.

173, 42 Pac. 3, 30 L.R.A. 167, 52 A.S.R. 769;

Morrow v. Smith, 145 Ia. 514, 124 N.W. 319;

United States v. Proprietors of Social Law Library, 102 Fed. (2d) 481, 484 (C.C.A. 1st, 1939);

Pease v. Pattison, L.R. 32 Ch. Div. 154, 55 L.J.

Ch. N.S. 617, 54 L.T.N.S. 209;

Spiller v. Maude, 11 L.T. (N.S.) 329;

In re Buck (1896), 2 Ch. 727;

Carter v. Whitcomb, 74 N.H. 482, 487, 69 Atl. 779;

Widows' and Orphans' Home of O.F. v. Commonwealth, 126 Ky. 386, 103 S.W. 354;

Most Worshipful G.L. of A.F. & A.M. v. Board of Review, 281 Ill. 480, 117 N.E. 1016, 1017;

City of Indianapolis v. The Grand Master, &c, 25 Ind. 518, 522;

Estate of Lubin, 186 Cal. 326;

Estate of Henderson, 17 Cal. (2d) 853 (1941);

City of Petersburg v. Peterb'y Ben. Ass'n., 78 Va. 431, 436;

Estate of Lowe, 326 Pa.St. 375, 192 A. 405, 111 A.L.R. 518 (1937);

Troutman v. De Boissiere etc. Ass'n., 62 Kans. 621, 64 Pac. 33, (1901);

Northwestern Masonic Aid Association v. Chance, 154 Pa. 99, 26 Atl. 253;
In re Y. M. C. A. Retirement Fund, 18 B.T.A. 139;
Plattsmouth Lodge No. 6, A.F. & A.M. v. Cass County, 79 Neb. 463, 113 N.W. 167.

No. 11,029

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

LA SOCIETE FRANCAISE DE BIENFAISANCE
MUTUELLE (a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

P. A. BERGEROT,

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FILED

DEC 28 1945

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No. 11,029

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

LA SOCIETE FRANCAISE DE BIENFAISANCE

MUTUELLE (a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The law-making body decides what the exemptions from taxation shall be, and into the wisdom or policy of such decision the courts do not inquire. The opinion disregards and nullifies the unmistakable purpose of Congress, for whose decision it, in effect, substitutes its own view as to whether nonprofit hospitals such as appellee's should receive exemption.

The opinion also fails to distinguish between appellee's "*purposes*" and the *means* by which such pur-

poses are realized, that is, it treats the *means* by which it derives income to promote the "*purposes*" which are made the basis for the exemption, as if those *means* were, in and of themselves, ends or objectives.

The opinion seemingly states that the trial court found that appellee "was organized and operated exclusively for charitable purposes". What it found (R. 54) was, that it was a "charitable corporation *within the meaning*" of the relevant sections of the Act. The controlling question is not whether appellee, as a nonprofit hospital, is a charitable corporation *generally*, (though we believe it to be such), but whether *Congress* considered such hospitals to be charitable and intended to exempt them.

Also, in every essential particular, the opinion is directly opposed to *Better Business Bureau v. United States*, 60 S. Ct. 112. Thus:

1. The opinion there states that the "*legislative history*" showed that the Bureau was not exempt; that "Congress has made it clear from its *committee reports*", what were to be excluded; that thereby it has made an "*unmistakable demarcation*" between exempt institutions and others and has shown what was its "*manifest desire*"; that, when it later amended the act, its "*committee report* referred specifically" to designated organizations, and that the administrative definition is "highly relevant and material evidence of the probable general understanding of the times *and of the opinions of men who probably were active in the*

drafting of the statute.” This latter language peculiarly applies to the action of a *conference committee* at the final and critical stage of the enactment of legislation.

Here, however, the opinion completely ignores this basic and every-day aid to construction which, if observed, is decisive.

2. The opinion there states that “no part of its net earnings inures to the benefit of any private shareholder or individual”; that, regardless of whether its operations are properly characterized as “educational”, “an *important if not its primary pursuit*” is to “promote” a profitable *business* community; that there is “a *commercial* hue permeating it”, and that its “activities are largely animated by this *commercial purpose.*” (Emphasis ours). In other words, the Bureau’s *ends* are *commercial*, just as in *Northwestern Municipal Association v. United States*, 99 Fed. (2d) 460, where it was held to be a “mere adjunct” of private institutions for profit.

The *converse* here is true. Appellee’s sole *end* or *purpose* is the *protection of health*. All its income, from whatever source, is “*mediate* to the *primary purpose*”, (per L. Hand, J., in *Slee v. Commissioner*, 2d Circ., 42 Fed. (2d) 184.

3. The opinion there states:

“In order to fall within the claimed exemption, an organization must be devoted to educational *purposes* exclusively. This plainly means that the

presence of a single non-educational *purpose*, if substantial in nature, will destroy the exemption * * * an important if not the *primary pursuit* of petitioner's organization is to *promote* not only an ethical but also a profitable *business community*." (emphasis ours)

The record (Cong. Rec., Vol. 79, Part 10, pp. 11,321, 11,323, amendments Nos. 15 and 81) shows:

"The Senate amendment adds to the list of purposes '*or hospital*' as a clarifying amendment. The Senate recedes, the conferees omitting this language as *surplusage*, based on the fact that the Internal Revenue Bureau has uniformly construed language in the income tax laws, identical with that found in the house bill, *as exempting hospitals not operated for profit*, and also on the fear that the insertion of the words added by the Senate amendment might interfere with the long-continued construction of the income tax law."

We submit that the intention of Congress could not more unmistakably have been shown. Necessarily, therefore, *the Act must be read as if its language were*, "religious, charitable, scientific, literary, or educational, OR HOSPITAL, purposes", for this is precisely what Congress *understood and intended*.

Also, the Conference Committee report ITSELF CONSTRUES THE CLAUSE, "no part of the net earnings of which inures to the benefit of any private shareholder or individual", as *inapplicable to nonprofit hospitals*. This is evidently so. Since the

report intended to exempt all "hospitals not operated for profit", it necessarily considered that their earnings do *not* inure to private gain.

The Bureau of the Census report* states that, in 1939, there were in this country 6,991 hospitals, which it classifies as:

"Proprietary"	2,295	32.82	per cent
"Government"	1,729	24.74	" "
"Non-profit"	2,967	42.44	" "

These "non-profit" hospitals are the *same* as those to which the conference committee report refers as "hospitals not operated for profit". This "non-profit" group is stated in the Census Bureau report to be composed of "church, *fraternal* or other *association controlled* institutions". The latter two are important components of the "non-profit" group.

Congress well knew (a) of the various classes of nonprofit hospitals, that is, of the existence of "fraternal" and other "association controlled" hospitals, (scarcely any congressional district but has one or several of them); (b) that these included railroad, mining, lumbering, steel and many other large employee groups, (railroad hospitals, alone, must have well over half a million members), which are all nonprofit, and (c) that these "fraternal" and "association controlled" hospitals are maintained for, and largely supported by, *dues-paying* members, who, thereby become entitled to treatment.

*"Vital Statistics—Special Reports, Hospitals and Other Institutional Facilities and Services, 1939" Vol. 13, No. 2, p. 7.

Indeed, in many of the smaller communities, there will be only the fraternal or organization controlled hospital, where, however, non-members also are treated. Congress could not have intended that they could treat nonmembers only at the risk of thenceforth being held to be "operated for profit". In *Bedford v. Colorado Fuel & Iron Corp.*, 102 Colo. 538, 81 Pac. (2d) 752, though non-members were charged more than members, the nonprofit hospital was held charitable and exempt from taxation.

Congress has not distinguished between the various classes of nonprofit hospitals, ("church, fraternal, or other association controlled institutions"). All were treated alike. All were exempted, and not merely some of them. The exclusion was not restricted to "free", or "charitable", or "non-member", hospitals. The test is, "operated for profit". What Congress did not wish to exempt were the 2,295 "proprietary" hospitals.

The government cannot point out *which* of these 2,967 "nonprofit" hospitals shall be held not to be such, nor what principle of differentiation shall apply, nor the difference between appellee and other "fraternal" or "institution controlled" hospitals. The exemption cannot be narrowed down to "church" hospitals, for nearly all their patients usually pay for treatment.

The House and Senate reports (Brief for Appellee, pp. 10-12) show, also, that a large part of all workers

(9,389,000 out of 37,743,000) were to be “*excluded*”, and that such exclusion was to embrace “*institutional workers*”. Appellee is an “institution”.

The opinion, we submit, violates the settled principle that exemption is not lost by using income, *from whatever source, to further the purposes* which are made the basis for the exemption. This error appears from the committee reports and is further shown by numerous decisions. The committee reports expressly sanction operations for *profit*. What is to control is the *use* or *destination* of any income so earned. As twice stated in each report, (Brief for Appellee, p. 12):

“For the purpose of determining whether such an organization is exempt, the *USE to which the net income is applied is the ultimate test of the exemption rather than the SOURCE from which the income is derived.*”

Similarly, in *Trinidad v. Sagrada Orden*, 263 U. S. 581, 68 L. Ed. 458, 44 S. Ct. 204:

“First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, *and yet have a net income*. Next, it says nothing about the *source* of the income, but makes the *destination* the ultimate test of exemption.” (Emphasis ours.)

As said in *Commissioner v. Kensico Cemetery*, 2d Circ., 96 Fed. (2d) 594, 596, “the cemetery’s revenues were *devoted to the purposes* for which the statute desires them to be exempt”, that is, “to a

public purpose *which the tax law aims to protect.*" (emphasis ours)

Again, in *Koon Kreek Klub v. Thomas*, 5th Circ., 108 Fed. (2d) 616, 618:

"The exemption applies to profits so long as they are retained by the organization or used to *further the purposes which are made the basis of the exemption*, and are *not otherwise used* for the benefit of any private shareholder." (emphasis ours)

In *United States v. Proprietors of Social Law Library*, 1st Circ., 102 Fed. (2d) 481, 484, the library was held exempt although its net earnings enabled it to do better work, whereby it was made more serviceable to its members, and notwithstanding that this "*resulted in distributing its benefits among private shareholders or individuals.*"

In this respect, no distinction, we submit, exists between earnings from rents or investments or from the use of surplus facilities, that is, income from non-member patients. Indeed, their treatment is strictly a *hospital* "purpose". By treating non-members, appellee did not "enter" a new "field". As said in *Commissioner v. Chicago Graphic Arts Federation*, 7th Circ. 128 Fed. (2d) 444:

"Any business in which respondent has engaged of a kind *ordinarily* carried on was only *incidental or subordinate* to its main or primary purpose." (emphasis ours.)

But even were it otherwise, this would be immaterial. In *Roche's Beach, Inc. v. Commissioner*, 2d

Circ., 96 Fed. 776, income not ancillary or incidental, but earned by the incorporated business subsidiary of a charitable testamentary foundation, was held exempt.

The act seeks to encourage *non-pecuniary* benefits, that is, the treatment of the sick without profit, especially of a large group whose membership is unlimited. Congress sought to *favor* nonprofit hospitals because of their benefit to the entire community. And the imposition of the tax upon appellee is subversive of this public policy. To deny exemption where income, from whatever source, is applied to promote the health of a large part of the community, nullifies the intention of Congress.

The act forbids that net income shall inure, in a pecuniary sense, to the benefit of any "*private*" shareholder or individual, that is, to the "*private*" pecuniary benefit of one or more members of the group, as distinguished from the benefits to the group as a whole. To hold that "*private*" applies to *each* member of a group of *ten thousand* persons ignores the meaning of language and abolishes the distinction between the group and those members thereof who are "*privately*" benefited, that is, who receive a benefit *peculiar* to themselves. "*Private*" gain defeats the exemption. Were appellee's membership to increase to twenty, thirty, or fifty thousand, would it still be said that net income from non-member patients inured to the "*private*" advantage of *each*

member? And if not, ten thousand members are enough.

“*Private pecuniary profit and gain is the test to be applied,*” *Kemper Military Academy v. Crutchley*, 274 Fed. 125. Appellee’s members, however, have no *proprietary* right in its assets, but only one to treatment, (10 Corp. Jur. Secun. 297).

The added benefits to appellee’s members from augmented earnings, *from whatever source derived, is the very purpose upon which the exemption of non-profit hospitals is founded.* Even had Congress erred in treating nonprofit hospitals as “charitable” institutions—though its view is upheld by numerous decisions—its determination is none the less binding upon the courts. Congress was competent to say, (as in *Ould v. Washington Hospital*, 95 U.S. 303, 311), that charity refers to “almost anything that tends to promote the well-doing and well-being of social man.”

As we have shown, the Act must be read as if it exempted, *in terms*, corporations organized and operated for “religious * * * or hospital purposes.” This clause does not deal either with the *source* or *destination* of its revenues, but designates the *purposes* only. “Exclusively” refers only to these primary *purposes* for which the corporation is formed, that is, its *objects* or *ends*, and *not* the *means* by which such “purpose” is accomplished.

For convenience, Sections 811(b)(8) and 907(c)(7) of the Security Act are set forth:

“Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational *purposes*, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any *private* shareholder or individual.”

The concluding clause, “no part * * *”, does not define or qualify “charitable” in the first clause. It also appears (Int. Rev. Code Sec. 101(5)(7)(8)(9)) in relation to cemetery companies, business leagues, clubs, board of trade, and the like. In substance, it means “not for private gain”. As said in *Mertens Law of Federal Income Taxation*, Vol. 6, Sec. 34.18, p. 29, this clause “is independent of the other tests, it operates regardless of the fact that the purposes may be religious, educational or literary.”

Nor does appellee benefit at the “expense” of outsiders. The latter pay only the current prevailing rates for like hospitals in the community, (R. 144).

The public health is one of the gravest concerns of the state, upon which may depend its existence or survival. It is greatly in the public interest that the largest number of persons receive the utmost protection and at the lowest cost. For nonprofit hospitals to reduce their overhead by also caring for non-members helps to widen their benefits. *The better*

appellee accomplishes this, the better it justifies and deserves the exemption which Congress intended it to receive.

Appellee's requirements for admission are simple and non-exclusive. Applicants need only be *partly* of French birth, or speak French, the latter requirement being liberally construed, (R. 30, 137). From a few members, appellee's membership has increased to nearly ten thousand. The public interest is directly served by continually extending those benefits to more and more people.

We submit, therefore, that the exemption is not destroyed if, by reason of augmented income—whether from rents, investments or receipts from non-member patients—appellee can better further the “*purposes*” which are made the basis for the exemption. If net income is *not otherwise* used for the benefit of any “private” individual, the “purpose” which the exemption seeks to encourage is fully satisfied.

The opinion, we submit, errs in stating:

“The Society has cited a number of tort cases holding various types of hospitals charitable and so not liable for the negligence of doctors employed in such hospitals.”

In our brief, (pp. II-IV), we had cited thirty-nine decisions holding nonprofit hospitals to be *per se* charitable institutions. They related to torts and to

charitable gifts, and of them the following *fifteen* dealt specifically with *exemptions from taxation*:

In re Mendelsohn, 262 App. Div. 605, 51 N.Y.S.

(2d) 435, 440 (social security tax).

Commissioner of Internal Revenue v. Battlecreek, Inc., 126 Fed. (2d) 405, (income tax).

In re Rust's Estate, 168 Wash. 344, 12 Pac. (2d) 396, 398 (1932).

New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 91 N. E. 385, 387, (1910).

People v. Sexton, 267 App. Div. 736, 48 N. Y. Supp. (2d) 201.

Scripps Memorial Hospital v. California Employment Commission, 24 Cal. (2d) 669, 151 Pac. (2d) 109, (social security tax).

Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212, (1934).

Lutheran Hospital Ass'n v. Baker, 40 S.D. 226, 167 N.W. 148 (1918).

State v. H. Longstreet Taylor Foundation, 198 Minn. 263, 269 N. W. 469 (1936).

German Hospital v. Board of Review, 233 Ill. 246, 84 N. E. 215.

County of Menepin v. Brotherhood of Gethsemane, 27 Minn. 460, 38 A.R. 298.

Bedford v. Colorado Fuel & Iron Corp., 102 Colo. 538, 81 Pac. (2d) 752, 759.

Rush Hospital Benev. Ass'n v. Board of Sup'rs., 187 Miss. 204, 192 So. 829 (1940).

Piedmont Memorial Hospital v. Guilford County, 218 N.C. 673, 12 S.E. (2d) 265.
Virginia Mason Hospital v. Larson, 9 Wash. (2d) 284, 114 Pac. (2d) 976, (social security tax).

Nonprofit hospitals have long been held charitable. As said by Mr. Justice Cardozo in *Butterworth v. Keeler*, 219 N.Y. 446, 114 N.E. 803, nonprofit "universities and hospitals are unquestionably public charities", and by L. Hand, J., in *Slee v. Commissioner*, 42 Fed. (2d) 184, "to maintain health without profit * * * has been a recognized form of charity from time immemorial." It was competent for Congress to take the same view. See:

Buchanan v. Kennard, 234 Mo. 117, 139, 136 S. W. 415, Ann. Cas. 1912D 50, involving a devise in trust to maintain a hospital not restricted to the poor, the court holding the relief of the sick, rich or poor, to be a charitable purpose.

The opinion states that, in 1944, receipts exceeded disbursements by nearly \$70,000 and that sixty-seven per cent of the total income in that year was from non-members. Normally member-patients far outnumber non-members, (Plff. Exh. 10, R.168). However, in the seven years ending February 28, 1943, disbursements exceeded receipts by \$105,134.08. In the eight years ending February 29, 1944, they exceeded receipts by \$35,283.96, (R. 156), and in that period appellee's surplus account decreased, by \$65,682.95, to \$70,642.70,

(R.80). In the same period, permanent improvements, semi-permanent improvements and maintenance amounted to about \$125,000, (R. 83, Plff. Exh. 4). Briefly, during these eight years there was *no* “*net income*” which could have enured in the “private” benefit of any one.

Moreover, excess in receipts over disbursements in 1944 was *temporary*, because appellee’s hospital, like all others, is fully occupied during the emergency. When receipts return to normal, wages and other expenses will probably continue *permanently* higher. The 1944 “profit” will prove to have been worse than illusory.

The donations and bequests have aggregated \$362,-822.63, (R. 81). In the past thirty years, appellee’s average annual income from interest, rents and dividends has been from \$7,000 to \$10,000, practically all being income from such gifts and donations, (R. 85). What is certain is, that after deducting these gifts and the increment therefrom, its assets, in the period of ninety-three years, have increased at an annual rate of less than five thousand dollars, and that such assets consist only of its hospital property and of moderate reserves essential to its continued existence. Everything has gone to the protection of health.

By the 1939 change in ruling, appellee was required to pay an additional \$13,550.56, represented by:

<i>Employees’ tax</i> , (Title VIII) paid by appellee from its own funds and not repaid to it.....	\$6,195.77
<i>Penalties</i> (under Title IX).....	976.51

<i>Penalties</i> (under Title VIII).....	4,019.84
<i>Interest</i> (under Title IX).....	404.13
<i>Interest</i> (under Title VIII).....	1,954.61

This \$13,550.56, with the employer's tax under Title VIII, (\$15,785.57), and its tax under Title IX, (\$5,933.72), represents the \$35,269.85 for which appellee recovered judgment. Interest and taxes, then, added *more than sixty per cent* to its *own* obligation. The claims for refund also rely on this change in ruling, (R. 20).

Under such circumstances, courts make every effort to find means to correct flagrant injustice, (*Bull v. United States*, 295 U. S. 247, 79 L. Ed. 421, 55 S. Ct. 695).

The cases referred to in the opinion are not, we submit, to the contrary. In the first place, they refer to the taxpayer's *own* obligation.* Here, liability for employee's tax was to be borne by *them*. The employer merely *transmits* it to the fund. Congress never intended that the employer should pay it. After the 1937 ruling, however, appellee had no discretion but to pay wages without deduction, for non-payment would have been a misdemeanor, (Cal. Labor Code, Sec. 216).

Any court would hesitate to say that there can *never* be an estoppel against the government. There

*In one of them, (*National Rifle Association v. Young*, 134 Fed. (2d) 524), it is said that

"Since there is no showing that appellant changed its position or was in any way injured by reason of the Social Security's earlier ruling there is no basis for a claim of estoppel."

are cases to the contrary, (*Mertens, Law of Federal Income Taxation* (1943), Vol. 10, Sec. 60.13, p. 636), and hence the state court found no difficulty in this respect, (Brief for appellee, p. 7). If an estoppel *ever* can arise, it could never be more justly than here. That appellee, though wholly without fault, should still be required to pay penalties of \$4,996.05, offends the moral sense.

In the next place, appellee's right to redress is not restricted to estoppel. I.R.C. Sec. 3612(d) provides for a twenty-five per cent penalty for failure to file a return.

“Except that when a return is filed after such time and it is shown that the failure to file it *was due to a reasonable cause and not to wilful neglect, no such addition shall be made to the tax.*”

and section 3655(b) for an additional penalty of five per cent for non-payment after demand by the collector.

Furthermore, Section 3791(b) authorizes the Commissioner, with the approval of the Secretary, to prescribe the extent, if any, to which any ruling relating to the internal revenue laws shall be applied without retroactive effect. This, of itself, recognizes that the government's right to the tax was not intended to be made absolute, but to be within the Commissioner's discretion, the abuse of which the courts are not powerless to remedy. They have frequently disapproved his regulations, (*Mertens, op. cit.*, Vol. 9, Sec.

49.18, p. 176, Sec. 35.68), where not reasonable or not in furtherance of the congressional intent. Also, the Commissioner may refund *penalties* collected without authority, and all taxes “in any manner wrongfully collected” (Id)3770(a)(1).

Congress never intended to *penalize* a “taxpayer” who, though ready to pay, was told by the commissioner that no tax was due and that none could be accepted. In *Fromm Bros. Inc. v. United States*, 35 Fed. Supp. 145, 148, where taxpayer was advised by its attorney that it was exempt from social security tax, it was held that “the Commissioner’s assessment and collection of penalties for delinquency and for alleged wilful failure to file the return was unwarranted.”

Ordinarily, tender stops interest. None could be made where the assumed “creditor” states that there is *no* debt and that he will not accept payment. In the absence of contract, interest is *awarded as damages* on the theory of *wrongful* detention, (33 Corp. Jur. 178), that is, after *default*. The rule in equity is that the allowance or denial of interest is in the court’s sound discretion, (33 Corp. Jur. 182). In *Richardson v. Louisville Banking Co.*, 5th Circ., 94 Fed. 442, 449, though judgment was rendered against a receiver, it was held interest should not be charged against him for “refusing to recognize complainant’s demands, until they were judicially determined.”

CONCLUSION.

In conclusion, we submit that appellee is a hospital "not operated for profit" and, as such, a charitable corporation within the meaning of the relevant sections of the Social Security Act; that its exclusive purpose is, and always has been, charitable, that is, the treatment of the sick without profit; that, even in the absence of the unmistakable indication furnished by the conference committee report, a nonprofit hospital is, *per se*, a charitable institution, and that what governs is the use of the income, and not the source from which it is derived.

Moreover, the Commissioner further erred in requiring appellee to pay the employees' contributions which had accrued before the change in ruling in 1939, and interest and penalties, and in denying its claims for the refund thereof.

It is respectfully submitted that a rehearing should be granted.

Dated, San Francisco, California,
December 28, 1945.

P. A. BERGEROT,

A. P. DESSOUSLAVY,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, P. A. BERGEROT and A. P. DESSOUSLAVY, hereby certify that in their judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, San Francisco, California,
December 28, 1945.

P. A. BERGEROT,
A. P. DESSOUSLAVY,
*Attorneys for Appellee
and Petitioner.*

No. 11037

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

**JAMES H. COLLINS, SIDNEY FISCHGRUND and
CHRISTOPHER E. SCHIRM,**

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vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In ³Two Volumes)

VOLUME I

(Pages 1 to 304, Inclusive)

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for the Southern District of California,
Central Division**

FILED

DEC 24 1945

**PAUL P. O'BRIEN,
CLERK**

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No. 15229

Filed Feb. 4, 1942

Viol: Section 17(a)(1), Securities Act of 1933 (15
U. S. C. Section 77q(a)(1)),

Section 215 of the Criminal Code (18 U. S. C.
338).

Section 37 of the Criminal Code (18 U. S. C. 88).
(Securities Act, Mail Fraud and Conspiracy.)

In the District Court of the United States in and for the
Southern District of California
Central Division

Of the February Term A. D. 1942

The Grand Jurors of the United States of America,
duly impaneled, sworn and charged to inquire of crimes
and offenses within and for the body of the Central
Division, Southern District of California, upon their
oaths present and find that during the time hereinafter
mentioned in this indictment:

That Union Associated Mines Company was a corpora-
tion organized and existing under and by virtue of the
laws of the State of Utah, with its principal office at
Salt Lake City, Utah.

That heretofore, to wit, during the period of time com-
mencing on or about the first day of June, 1938, and con-
tinuously thereafter to and including the first day of De-
cember, 1939, at Los Angeles, California, in the Central
Division of the Southern District of California and within
the jurisdiction of this Court:

JAMES H. COLLINS
SIDNEY FISCHGRUND
FRED V. GORDON
JOHN H. MORGAN
CHRISTOPHER E. SCHIRM,

whose full and true names are to the Grand Jurors otherwise unknown, and who are hereinafter in the several counts of this indictment sometimes referred to as "defendants", heretofore and prior to the several acts hereinafter set forth of using the United States mails, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, [2] representations and promises from: Erlene Bates, Ida M. Apperson, Henry K. Elder, D. E. Williams, Ray W. Peet, Lewis J. Hampton, R. D. Brown, Mathilda M. Klinger, Grace T. Walker, Katherine C. Davis, Ila M. Hutchason, Frank L. Tucker and other persons whose names are to the Grand Jurors unknown and are too numerous to mention herein, including that class of persons then residing in the States of California and Utah and elsewhere, whom the said defendants might induce and cause to be induced to purchase stock of Union Associated Mines Company, hereinafter sometimes referred to as the "corporation", all of which said persons are hereinafter referred to as the "persons to be defrauded", which scheme and artifice was, in substance, as follows:

It was a part of said scheme and artifice that the defendants would incorporate under the laws of the State of California, Plymouth Oil Company and that the defendant Gordon would be its president, the defendant Fischgrund would be its vice-president, and that Guy B. Davis would be its secretary and treasurer.

It was further a part of said scheme and artifice that the defendants would purchase shares of stock of the "corporation" at prices of $1/4\text{¢}$ to $1/2\text{¢}$ per share from the holders of the outstanding shares of stock of the "corporation".

It was further a part of said scheme and artifice that the defendants would place the defendant Morgan in the position of secretary and treasurer of the "corporation" and that they would place R. R. Bray as president of the "corporation".

It was further a part of said scheme and artifice that the defendants would cause the "corporation" (whose right to transact business in the State of Utah had been forfeited and whose charter had been suspended) to be restored to and reinstated in the exercise of its former rights, corporate privileges and immunities under the laws of the State of Utah.

It was further a part of said scheme and artifice that the defendants would execute and cause to be executed an agreement between the "corporation" and Plymouth Oil Company whereby the "corporation" conveyed 635,000 [3] shares of its stock to Plymouth Oil Company and whereby Plymouth Oil Company conveyed to the "corporation" a 50 per cent interest in the gross production of oil to be produced from a well to be drilled in Torrance Field, California.

It was further a part of said scheme and artifice that the defendants by the means and under the circumstances hereinafter set forth, would sell and cause to be sold to the persons to be defrauded shares of stock of said "corporation" at artificially excessive and inflated prices.

It was further a part of said scheme and artifice that the defendants in the sale of the stock of the "corporation" to the persons to be defrauded would incite and entice the persons to be defrauded and cause the persons to be defrauded to be incited and enticed to purchase the shares of stock of the "corporation" by painting glowing prospects of great profit from an investment in said shares of

stock and by false and fraudulent representations and promises and by means of untrue statements of material facts, calculated and intended by said defendants to arouse in the persons to be defrauded expectations of profit and financial gain from such investments far beyond the limits warranted by existing conditions.

It was a further part of said scheme and artifice that the defendants would deceptively, deceitfully and fraudulently manipulate the market in the stock of said "corporation" so as artificially to advance and inflate and cause artificially to be advanced and inflated the price thereof, from approximately 1/4¢ per share to 5¢ per share, for the purpose and with the intent of raising the market price so as to enable the defendants to sell to the persons to be defrauded and to the public generally the shares of stock of said "corporation".

It was further a part of said scheme and artifice that the defendants would not and they did not permit and allow the market price for said shares of stock of the said "corporation" to be determined by the normal attrition of supply and demand for said stock by the actual worth of said stock, by the normal clash in the open over-the-counter market [4] between all the then buyers and all the then sellers of said stock, but would arbitrarily and fraudulently fix the bid and asked and market prices according to said scheme and artifice, at successively rising, inflated and excessive prices, without regard for the public demand for purchases of said stock and the supply of said stock available from brokers and dealers.

It was further a part of said artifice and scheme that the defendants would lease and assign and cause to be leased and assigned unproven and undeveloped properties claimed by defendants to be of value to said "corpora-

tion", and secure for themselves from said "corporation" 235,000 shares of the stock of said "corporation".

It was further a part of said scheme and artifice that the defendants would execute and cause to be executed an agreement between the "corporation" and Plymouth Oil Company whereby the "corporation" conveyed 635,000 additional shares of its stock to Plymouth Oil Company and whereby Plymouth Oil Company conveyed to the "corporation" a 40 per cent interest in the gross production of oil to be produced from a well to be drilled in Torrance Field, California, after the payment of the costs of drilling of such well.

It was further a part of said scheme and artifice that the defendants would execute and cause to be executed an agreement whereby E. Byron Siens should sell 1,000,000 shares of the stock of the "corporation" which said stock was to be and was furnished said Siens by defendants and Plymouth Oil Company to defendant Collins at successively rising and excessive prices of from 2-1/2¢ to 30¢ per share, and that said Collins would thereafter sell and cause to be sold to the persons to be defrauded and to the public generally said 1,000,000 shares of stock of said "corporation" at successively rising, inflated and excessive prices.

It was further a part of said scheme and artifice that the defendants for the purpose of manipulating the exchange price, for the purpose of securing an additional medium through which they, the said defendants, could market the shares of stock of said "corporation", and for the [5] purpose and with the intent of selling to the persons to be defrauded shares of stock of the "corporation", and with the knowledge that the stock of the "corporation" had theretofore been listed for trading upon

Salt Lake Stock Exchange, Salt Lake City, Utah, would file and cause to be filed an application with Salt Lake Stock Exchange to relist the stock of the "corporation" upon Salt Lake Stock Exchange.

It was further a part of said scheme and artifice that the defendants would print, edit and prepare and cause to be printed, edited and prepared, bulletins, circulars, letters, notices, and other literature, all of which would contain false and misleading statements as hereinbelow described, and which would be disseminated and transmitted to the persons to be defrauded and to the public generally by the defendants, their agents and employees, and the defendants would conduct and cause to be conducted an intensive, extensive and persistent selling campaign of the shares of stock of the "corporation" to the persons to be defrauded at artificially excessive, inflated and rising prices in the cities of Los Angeles, California, Salt Lake City, Utah, and elsewhere.

It was further a part of said scheme and artifice that the defendants would, for the purpose of inducing and causing the persons to be defrauded to part with their money and property, and to purchase shares of stock of the "corporation", make and cause to be made the following false, fraudulent and untrue representations, promises and statements to the persons to be defrauded, by means of oral communications and by means of written communications, circulars, bulletins, letters, telegrams, and newspaper advertisements, which said representations, promises and statements would be and were substantially as follows:

(1) That Plymouth Oil Company was owned almost in its entirety by Roy Lacy, a prominent business man of Los Angeles, California, when in truth and in fact, as

the said defendants then and there well knew, Plymouth Oil Company was not owned almost in its entirety by Roy Lacy, but on the contrary, Roy Lacy at no time owned any stock of Plymouth Oil Company but was a creditor of Plymouth Oil Company and defendant Gordon [6] by reason of cash advances made to Plymouth Oil Company at the request of the defendants.

(2) That Roy Lacy, a prominent business man of Los Angeles, California, was president of Plymouth Oil Company, when in truth and in fact, as the defendants then and there well knew, Roy Lacy was not president of Plymouth Oil Company, but on the contrary, the defendant Gordon at all times after the incorporation of Plymouth Oil Company, was its president, and Roy Lacy at no time was an officer or director of Plymouth Oil Company.

(3) That Union Associated Mines Company would pay a dividend of more than 3¢ per share upon its stock within the first year of its business transactions with Plymouth Oil Company, when in truth and in fact, as the defendants then and there well knew, Union Associated Mines Company would not pay a dividend of more than 3¢ per share upon its stock within the first year of its transactions with Plymouth Oil Company, but on the contrary, the only source of revenue of Union Associated Mines Company was its 50 per cent interest in the gross production of oil from Plymouth Oil Company #1 well, which production commenced in December, 1938, at approximately 225 barrels of oil per day and declined to an average production of approximately 30 barrels of oil per day in March, 1939.

(4) That the stock of Union Associated Mines Company would increase in price from 3¢ to 15¢ or 20¢ per share because of the oil interest that Union Associated

Mines Company had acquired, when in truth and in fact, as the defendants then and there well knew, the stock of Union Associated Mines Company would not increase in price from 3¢ to 15¢ or 20¢ per share because of the oil interest that Union Associated Mines Company had acquired, but on the contrary, the only source of revenue of Union Associated Mines Company was its 50 per cent interest in the gross production of oil from Plymouth Oil Company #1 well, which production commenced in December, 1938, at approximately 225 barrels of oil per day and declined to an average production of approximately 30 barrels of [7] oil per day in March, 1939, and the only additional oil interest acquired by Union Associated Mines Company was a 40 per cent interest in the gross production of oil obtained from Plymouth Oil Company well #2 after the costs of drilling well #2 had been paid, and from which no income was ever received by Union Associated Mines Company.

(5) That Union Associated Mines Company owned one producing well and would shortly bring in a second producing well, when in truth and in fact, as the defendants then and there well knew, Union Associated Mines Company did not own one producing well and would not shortly bring in a second producing well, but on the contrary, through contracts with Plymouth Oil Company, Union Associated Mines Company acquired merely a 50 per cent interest in the gross production of oil to be obtained from Plymouth Oil Company well #1 and 40 per cent interest in the gross production of oil to be obtained from Plymouth Oil Company well #2 after the costs of drilling well #2 had been paid.

(6) That an investment in the stock of Union Associated Mines Company would return a lot of money and a big income, when in truth and in fact, as the defendants

then and there well knew, an investment in the stock of Union Associated Mines Company would not return a lot of money and would not return a big income, but on the contrary, by reason of previous drilling and close drilling in the area wherein Plymouth Oil Company wells #1 and #2 were located, production from each of said wells immediately and rapidly declined and sufficient oil was not obtainable from said wells to pay for the costs of drilling.

(7) That Plymouth Oil Company well #1 was producing 350 barrels of oil per day, when in truth and in fact, as the defendants then and there well knew, Plymouth Oil Company well #1 was not producing 350 barrels of oil per day, but on the contrary, Plymouth Oil Company well #1 at no time produced more than 225 barrels of oil per day, and in January, 1939, its average daily production was approximately 70 barrels of oil.

(8) That Plymouth Oil Company well #2 had been brought into [8] production at 500 barrels per day and was good for 1000 barrels per day if it were opened to its full capacity, when in truth and in fact, as the defendants then and there well knew, Plymouth Oil Company well #2 had not been brought into production at 500 barrels per day and was not good for 1000 barrels per day if it were opened to its full capacity, but on the contrary, the first and greatest production from Plymouth Oil Company well #2 was about 255 barrels per day, and within one month after production was obtained, Plymouth Oil Company well #2 was producing slightly over 70 barrels of oil per day.

(9) That Plymouth Oil Company well #1 came in at 500 barrels per day, when in truth and in fact, as the defendants then and there well knew, Plymouth Oil Com-

pany well #1 did not come in at 500 barrels per day, but on the contrary, the first and greatest production from Plymouth Oil Company well #1 was about 225 barrels of oil per day.

(10) That Union Associated Mines Company, with 1,400,000 shares of its stock outstanding, was earning 2-1/2¢ per share, when in truth and in fact, as the defendants then and there well knew, Union Associated Mines Company, with 1,400,000 shares of its stock outstanding, was not earning 2-1/2¢ per share.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 6th day of February, 1939, in the City of Los Angeles, California, in the Central Division of the Southern District of California and within the jurisdiction of this Court, so having devised the said scheme and artifice to defraud, did unlawfully, wilfully and feloniously in the sale of a security, to wit, the common stock of Union Associated Mines Company, by use of the United States mails, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

Said defendants on or about the 6th day of February, 1939, did place and cause to be placed in the Post Office of the United States of [9] America in the City of Los Angeles, California, aforesaid, to be transmitted by the Post Office establishment, a letter contained in a postpaid

envelope addressed to Mrs. Erlene Bates, 921 South Spaulding Drive, Los Angeles, California, said letter being substantially of the tenor following: [10]

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building
Los Angeles, California
February 6th, 1939

Mrs. Erlene Bates
921 South Spaulding Drive
Los Angeles, California

Dear Madam:

You will please find enclosed 17,000 shares of Union Associated Mines Company stock, which has been issued in your name.

Very truly yours,

PLYMOUTH OIL COMPANY

MK

By Guy B. Davis

Encl.

[Written]: EBB.

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants and each of them were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Section 17(a)(1), Securities Act of 1933, Section 77q(a)(1), Title 15 U. S. C.) [11]

Second Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 23rd day of March, 1939, in the City of Pasadena, California, in the Central Division of the Southern District of California and within the jurisdiction of this Court, so having devised the said scheme and article to defraud, did unlawfully, wilfully and feloniously in the sale of a security, to wit: the common stock of Union Associated Mines Company, by use of the United States mails, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

Said defendants on or about the 23rd day of March, 1939, in the City of Pasadena, California, caused to be delivered by the United States mails, according to the direction thereon, a certain letter addressed to Miss Grace T. Walker, 1400 Hillcrest Avenue, Pasadena, California, enclosed in a postpaid envelope, which said letter was substantially of the tenor following: [12]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY
Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah
March 22, 1939

Miss Grace T. Walker
1400 Hillcrest Avenue
Pasadena, California

Dear Madam:

Enclosed find certificates in the name of Grace T. Walker, 26,667 shares; Bessie G. McLean, 5,333 shares; Katherine C. Davis, 4,000; and Matilda M. Klinger, 4,000 shares of Union Associated Mines Company stock, as transferred.

Very truly yours,

Margaret Florence
Transfer Agent

enclosure

[Written]: M. M. Klinger

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants and each of them were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Section 17(a)(1), Securities Act of 1933, Section 77q(a)(1), Title 15 U. S. C.) [13]

Third Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the first day of April, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States Mails, according to the direction thereon, a certain letter addressed to Miss Ida M. Apperson, 401 South Gibson, Compton, California, enclosed in a postpaid envelope, which letter was substantially of the tenor following: [14]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah

March 31, 1939

Miss Ida M. Apperson
401 South Gibson
Compton, California

Dear Madam:

Enclosed find your certificate for 1,000 shares of Union Associated Mines Company stock as transferred to your name.

Very truly yours,

Margaret Florence
Transfer Agent

Union Associated Mines Co.
526 Utah Oil Bldg.
Salt Lake City, Utah

[Stamped]: Salt Lake City 3 Utah Mar 21 2 PM
1939

[Canceled postage stamp.]

Miss Ida M. Apperson
401 South Gibson
Compton, California

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338.) [15]

Fourth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 13th day of July, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States

mails, according to the directions thereon, a certain letter addressed to Mr. Lewis J. Hampton, 1054 South Hudson Avenue, Los Angeles, California, enclosed in a postpaid envelope, which letter was substantially of the tenor following: [16]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY
Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah
July 12, 1939

Mr. Lewis J. Hampton
1054 South Hudson Avenue
Los Angeles, California

Dear Sir:

Answering your recent inquiry, this is to advise you that since the new management took over the Union Associated Mines Company in the Fall of 1938, they have, in conjunction with the Plymouth Oil Company of Los Angeles, drilled two wells in the Torrance Oil Field, Los Angeles County.

The first well has netted the Company \$3923.00 to date. The second well cost approximately \$37,000 and has not yet been paid for. Your Company will receive no payments until the well is paid for.

Our expenses to date have been \$1603.00, which included re-establishing the old corporation, protecting the mining claims controlled by the Union Associated, office expenses, application for registration with the S. E. C., and application for listing with the Salt Lake Stock Exchange.

The Company has been somewhat disappointed in the returns from the two wells and has not been able to pay a dividend as soon as they expected. However, the Company does expect to pay a dividend as soon as the money has been earned from its two wells.

Very truly yours,

UNION ASSOCIATED MINES COMPANY

J. H. Morgan

J. H. Morgan, Secretary

JHM-mf

526 Utah Oil Bldg.
Salt Lake City, Utah

[Stamped]: Salt Lake City 1 Utah Jul 12
11:30 AM 1939

[Canceled postage stamp]

Lewis J. Hampton,

1054 So. Hudson Ave.,

Los Angeles, California

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [17]

Fifth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 2nd day of August, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, a certain letter addressed to Mathilda M. Klinger, 1400 Hillcrest Avenue, Pasadena, California, enclosed in a postpaid envelope, which letter was substantially of the tenor following: [18]

Wm. Weeks,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY
Telephone Wasatch 2130

Suite 526 Utah Oil Bldg. Salt Lake City, Utah
August 1, 1939

To the Stockholders of Union Associated Mines Co.:

The following is a report of your Company since the No. 1 well at Torrence Field, Los Angeles County was drilled.

The No. 1 well has produced \$8,241.44 as shown by the books of the Standard Oil Company, (Oil Purchaser). Union Associated interests amount to \$4,115.22. From this amount, your Directors have declared a dividend payable August 30, 1939, of \$1.00 per thousand shares on the issued and outstanding stock of record, (except the 635,000 shares delivered to the Plymouth Oil Company on Well No. 2, which 635,000 shares was delivered ex-dividend as per con-

tract between the two Companies.) Transfer books of the Company will be opened for transferring stock until August 23, 1939.

The No. 2 well has produced \$5,290.00 to date. This amount has been applied to costs of drilling as per original contract whereby Union Associated acquired its interests in No. 2 well.

The 40 acres in Kearn County remain unchanged, no well having been completed to prove or disprove the District. The lease at Lomita has been abandoned because the drilling in that area has proven unfavorable. From present appearances, the Union Associated will not acquire any interest in the West Montebello Field because the test well (Goff Course Well) is reported unfavorable at 8200 feet. This has been quite disappointing, as your Directors had intended making a very favorable deal with the Plymouth Oil officials on acreage in that District had the test well been successful.

There has been a contract let to drill the Beacon Dome, located on the Meridian Anticline Unita County, Wyoming. Through the efforts of the Plymouth Oil Company and the writer, your Company has acquired a 40-acre lease favorably located on that structure immediately adjacent to the land acquired by the drilling company. We are, also, negotiating for an 80-acre lease on Sulphur Creek Dome, which, from present appearances will be drilled this fall. These leases will cost the Company no stock and not to exceed \$100.00 each.

The Company has protected its mining claims in the Cottonwood and Erickson Mining Districts. These are the most important claims the Company owned during its metal-mining activity.

As heretofore stated, the present policy of the Union Associated is to acquire interests in oil wells or leases prior to drilling, with the expectation of big returns should the wells prove commercial. Of course, each attempt will not be successful, but adhering to the law of averages, we feel that this Company can be made a success.

In the future, the Company will attempt to get out a report as often as possible, but it is quite impractical to answer each individual letter, so please bear with us until a report to all the stockholders can be sent.

The cost of transferring stock is 25 cents for each certificate and 12 cents Federal transfer tax per 1000 shares.

Very truly yours,

UNION ASSOCIATED MINES COMPANY,

By J. H. Morgan, Secretary

[Written]: M. M. Klinger

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [19]

Sixth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 2nd day of August, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, a certain letter addressed to Henry K. Elder, 920 Walter P. Story Building, Los Angeles, California, enclosed in a postpaid envelope, which letter was substantially of the tenor following: [20]

Wm. Weeks,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY
Telephone Wasatch 2130

Suit 526 Utah Oil Bldg. Salt Lake City, Utah

[Written]: 20th Div—HKE

August 1, 1939

To the Stockholders of Union Associated Mines Co.:

The following is a report of your Company since the No. 1 well at Torrence Field, Los Angeles County was drilled.

The No. 1 well has produced \$8,241.44 as shown by the books of the Standard Oil Company, (Oil Purchaser). Union Associated interests amount to \$4,115.22. From this amount, your Directors have declared a dividend payable August 30, 1939, of \$1.00 per thousand shares on the issued and outstanding stock of record, (except the 635,000 shares

delivered to the Plymouth Oil Company on Well No. 2, which 635,000 shares was delivered ex-dividend as per contract between the two companies.) Transfer books of the Company will be opened for transferring stock until August 23, 1939.

The No. 2 well has produced \$5,290.00 to date. This amount has been applied to costs of drilling as per original contract whereby Union Associated acquired its interests in No. 2 well.

The 40 acres in Kearn County remain unchanged, no well having been completed to prove or disprove the District. The lease at Lomita has been abandoned because the drilling in that area has proven unfavorable. From present appearances, the Union Associated will not acquire any interest in the West Montebello Field because the test well (Goff Course Well) is reported unfavorable at 8200 feet. This has been quite disappointing, as your Directors had intended making a very favorable deal with the Plymouth Oil officials on acreage in that District had the test well been successful.

There has been a contract let to drill the Beacon Dome, located on the Meridian Anticline Uinta County, Wyoming. Through the efforts of the Plymouth Oil Company and the writer, your Company has acquired a 40-acre lease favorably located on that structure immediately adjacent to the land acquired by the drilling company. We are, also, negotiating for an 80-acre lease on Sulphur Creek Dome, which, from present appearances will be drilled this fall. These leases will cost the Company no stock and not to exceed \$100.00 each.

The Company has protected its mining claims in the Cottonwood and Erickson Mining Districts.

These are the most important claims the Company owned during its metal-mining activity.

As heretofore stated, the present policy of the Union Associated is to acquire interests in oil wells or leases prior to drilling, with the expectation of big returns should the wells prove commercial. Of course, each attempt will not be successful, but adhering to the law of averages, we feel that this Company can be made a success.

In the future, the Company will attempt to get out a report as often as possible, but it is quite impractical to answer each individual letter, so please bear with us until a report to all the stockholders can be sent.

The cost of transferring stock is 25 cents for each certificate and 12 cents Federal transfer tax per 1000 shares.

Very truly yours,

UNION ASSOCIATED MINES COMPANY,

By J. H. Morgan, Secretary.

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [21]

Seventh Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 2nd day of August, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, a certain letter addressed to Ila Mae Hutchason, 328 South Commonwealth Avenue, Los Angeles, California, enclosed in a postpaid envelope, which letter was substantially of the tenor following: [22]

Wm. Weeks,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah

August 1, 1939

To the Stockholders of Union Associated Mines Co.:

The following is a report of your Company since the No. 1 well at Torrence Field, Los Angeles County was drilled.

The No. 1 well has produced \$8,241.44 as shown by the books of the Standard Oil Company, (Oil Purchaser). Union Associated interests amount to \$4,115.22. From this amount, your Directors have declared a dividend payable August 30, 1939, of \$1.00 per thousand shares on the issued and outstanding stock of record, (except the 635,000 shares delivered to the Plymouth Oil Company on Well No.

2, which 635,000 shares was delivered ex-dividend as per contract between the two Companies.) Transfer books of the Company will be opened for transferring stock until August 23, 1939.

The No. 2 well has produced \$5,290.00 to date. This amount has been applied to costs of drilling as per original contract whereby Union Associated acquired its interests in No. 2 well.

The 40 acres in Kern County remain unchanged, no well having been completed to prove or disprove the District. The lease at Lomita has been abandoned because the drilling in that area has proven unfavorable. From present appearances, the Union Associated will not acquire any interest in the West Montebello Field because the test well (Goff Course Well) is reported unfavorable at 8200 feet. This has been quite disappointing, as your Directors had intended making a very favorable deal with the Plymouth Oil officials on acreage in that District had the test well been successful.

There has been a contract let to drill the Beacon Dome, located on the Meridian Anticline Uinta County, Wyoming. Through the efforts of the Plymouth Oil Company and the writer, your Company has acquired a 40-acre lease favorably located on that structure immediately adjacent to the land acquired by the drilling company. We are, also, negotiating for an 80-acre lease on Sulphur Creek Dome, which, from present appearances will be drilled this fall. These leases will cost the Company no stock and not to exceed \$100.00 each.

The Company has protected its mining claims in the Cottonwood and Erickson Mining Districts.

These are the most important claims the Company owned during its metal-mining activity.

As heretofore stated, the present policy of the Union Associated is to acquire interests in oil wells or leases prior to drilling, with the expectation of big returns should the wells prove commercial. Of course, each attempt will not be successful, but adhering to the law of averages, we feel that this Company can be made a success.

In the future, the Company will attempt to get out a report as often as possible, but it is quite impractical to answer each individual letter, so please bear with us until a report to all the stockholders can be sent.

The cost of transferring stock is 25 cents for each certificate and 12 cents Federal transfer tax per 1000 shares.

Very truly yours,

UNION ASSOCIATED MINES COMPANY,

By J. H. Morgan, Secretary

[Written]: Hutchason

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [23]

Eighth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 13th day of August, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, certificates numbered 4171, 4172, 4173, 4174 and 4175 each for 1000 shares of the common stock of Union Associated Mines Company, which certificates were enclosed in a postpaid envelope addressed to Mr. R. W. Peet, 937 West 49th Street, Los Angeles, California.

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338)

Union Associated Mines Co.

526 Utah Oil Bldg.

Salt Lake City, Utah

[Stamped]: Salt Lake City Utah 12:38 PM 1939

[Canceled postage stamps]

Mr R. W. Peet
937 West 49th Street
Los Angeles, California

[Written]: Union Ass. Mines Co Aug 8th 1939

25¢ per C tran	\$1.25	} 5000 Shares.
12¢ per C tax	60	
Ins & Post	12	
	<hr/> \$1.97	

R. W. Peet [24]

Ninth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 21st day of February, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, a certain confirmation of the purchase of 5000 shares of stock of Union Associated Mines Company, addressed to Frank L. Tucker, 1838 Victoria Avenue, Los Angeles, California, enclosed

in a postpaid envelope, which confirmation was substantially of the tenor following: [25]

R. L. COLBURN COMPANY

Brokers

Member

San Francisco Mining Exchange

639 S. Spring Street	155 Montgomery Street
Los Angeles, California	San Francisco, California
Telephone TUCKER 6274	Telephone KEARNY 2580
Frank L. Tucker	2/20/39

As agent we have this day Purchased for your account

No. Shares	Stock	Price	Amount	Com.	Amount
5000	Union Assoc.	.02¾	137.50	10.00	147.50

This transaction was consumated by us as broker for both buyer and sell.

All orders for the purchase and sale of stocks and bonds are received and executed with the distinct understanding that Actual Delivery is contemplated and that the party giving the order so understands and agrees.

It is further understood and agreed that on all accounts the right is reserved to close transactions without notice, when protection is exhausted, or so nearly so, in our judgment, as to endanger the account, and to settle contracts in accordance with the rules and customs prevailing, where order is executed.

We advise that you have these certificates transferred into your name immediately.

Thanking you for your kind order.

Yours very truly,

R. L. COLBURN COMPANY

By R. Evans

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [26]

Tenth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That they do here reallege and incorporate herein as if again set forth at length, the First Count of this indictment, except the last three paragraphs thereof;

That James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants as aforesaid, on or about the 21st day of September, 1939, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, then having devised the scheme and artifice in said First Count described, for the purpose of executing the same, and attempting so to do, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails, according to the direction thereon, a certain letter addressed to Mr. (Mrs.) Erlene B. Bates, 921 South Spaulding Avenue, Los Angeles, California, enclosed in a post paid envelope, which letter was substantially of the tenor following: [27]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY
Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah
September 20, 1939

Mr. Erlene B. Bates
921 South Spaulding Ave.
Los Angeles, California

Dear Sir:

You have been sent your check on Certificates No.'s. 4040 to 4050. Of course, we can do nothing about your other seven certificates until they are in either your hands or ours.

We have heard nothing from Mr. Metcalf here at our office. If you could give us the names on the certificates and the numbers, of course there might be some way to check the matter satisfactorily.

Very truly yours,

Margaret Florence

M-ff

Transfer Agent.

[Written]: EBB.

Union Associated Mines Co.

526 Utah Oil Bldg.

Salt Lake City, Utah

[Stamped]: Salt Lake City 2 Utah Sep 20 1:30
PM 1939

[Canceled postage stamp]

Mr. Erlene B. Bates

921 South Spaulding Ave.

Los Angeles, California

[Written]: EBB.

That said person to whom said envelope was addressed then was one of said persons to be defrauded, all of which acts of the said defendants, and each of them, were against the peace and dignity of the United States and contrary to the form of the Statute of the same, in such case made and provided. (Title 18 U. S. C., Section 338) [28]

Eleventh Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm, defendants aforesaid, continuously, through the period of time extending from about the first day of June, 1938, to about the first day of December, 1939, at Los Angeles, California, in the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed among themselves and with each other and with E. Byron Siens, J. A. Barclay, Arthur P. Adkisson and Guy B. Davis, not named herein as defendants, but as co-conspirators, and with other persons, whose names are to the Grand Jurors unknown, to commit certain offenses against the United States, to wit, to wilfully violate Section 17(a)(1) of Securities Act of 1933 (Section 77q(a)(1), Title 15 U. S. C.) and Section 215 of the Criminal Code of the United States (Section 338, Title 18, U. S. C.) and among such violations to commit the divers offenses charged against the said defendants in the First to Tenth Counts, inclusive, of this indictment, the allegations of which Counts, descriptive of the said defendants in the sale of the common stock of Union Associated Mines Company by the use of the United States mails, employing a

scheme and artifice to defraud, and of the connections of said defendants therewith, and descriptive of the defendants' use of the United States mails in furtherance of the said scheme as they had devised it, are hereby incorporated by reference to said First to Tenth Counts, inclusive, as if herein repeated, and each and all of said acts of each and all of the defendants so described in said First to Tenth Counts, inclusive, of this indictment are now here designated as overt acts of said defendants, done in pursuance of and to effect the objects of said conspiracy, and in addition thereto, the following named defendants and co-conspirators did and performed the following described separate overt acts, to wit: [29]

1. In pursuance of said conspiracy and to effect the objects thereof, Arthur P. Adkisson, at Los Angeles, California, on or about the 2nd day of September, 1938, affixed his signature to a certain agreement for the sale of the common stock of Union Associated Mines Company to A. A. Julian.

2. In pursuance of said conspiracy and to effect the objects thereof, Arthur P. Adkisson, at Los Angeles, California, on or about the 24th day of September, 1938, affixed his signature to a certain letter addressed to J. A. Barclay.

3. In pursuance of said conspiracy and to effect the objects thereof, defendant Gordon, at Los Angeles, California, on or about the 17th day of August, 1938, affixed his signature to Articles of Incorporation of Plymouth Oil Company.

4. In pursuance of said conspiracy and to effect the objects thereof, defendant Gordon, in October, 1938, called at 1400 Hillcrest Avenue, Pasadena, California, and conferred with certain of the persons to be defrauded.

5. In pursuance of said conspiracy and to effect the objects thereof, defendant Gordon, at Los Angeles, California, on or about the 3rd day of February, 1939, affixed his signature to a letter addressed to Grace T. Walker.

6. In pursuance of said conspiracy and to effect the objects thereof, defendant Gordon, at Tulsa, Oklahoma, on or about the 15th day of May, 1939, affixed his signature to a letter addressed to defendant Morgan.

7. In pursuance of said conspiracy and to effect the objects thereof, defendant Fischgrund, at Los Angeles, California, on or about the 17th day of August, 1938, affixed his signature to Articles of Incorporation of Plymouth Oil Company.

8. In pursuance of said conspiracy and to effect the objects thereof, defendant Fischgrund, at Los Angeles, California, on or about the 21st day of September, 1938, prepared an agreement to be executed [30] by officers of Plymouth Oil Company and Union Associated Mines Company, and signed such agreement as vice-president of Plymouth Oil Company.

9. In pursuance of said conspiracy and to effect the objects thereof, defendant Fischgrund, at Los Angeles, California, on or about the 18th day of May, 1939, affixed his signature to a letter addressed to the defendant Morgan.

10. In pursuance of said conspiracy and to effect the objects thereof, Guy B. Davis, at Los Angeles, California, on or about the 17th day of August, 1938, affixed his signature to Articles of Incorporation of Plymouth Oil Company.

11. In pursuance of said conspiracy and to effect the objects thereof, Guy B. Davis, at Los Angeles, California,

on or about the 6th day of February, 1939, affixed his signature to a letter addressed to Union Associated Mines Company.

12. In pursuance of said conspiracy and to effect the objects thereof, Guy B. Davis, at Los Angeles, California, on or about the 26th day of October, 1938, affixed his signature to check #37 of Plymouth Oil Company.

13. In pursuance of said conspiracy and to effect the objects thereof, defendant Schirm, at Los Angeles, California, on or about the 12th day of October, 1938, affixed his signature to a letter addressed to defendant Morgan.

14. In pursuance of said conspiracy and to effect the objects thereof, defendant Schirm, at Los Angeles, California, on or about the 13th day of October, 1938, affixed his signature to a letter addressed to defendant Morgan.

15. In pursuance of said conspiracy and to effect the objects thereof, defendant Collins, at Los Angeles, California, on or about the 17th day of January, 1939, affixed his signature to an agreement to purchase 1,000,000 shares of the common stock of Union Associated Mines Company from E. Byron Siens.

16. In pursuance of said conspiracy and to effect the objects [31] thereof, defendant Collins, on or about the 17th day of January, 1939, established an office with E. Byron Siens in a suite of offices known as 905 Foreman Building, Los Angeles, California.

17. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Salt Lake City, Utah, on or about the 24th day of January, 1939, affixed his signature to a letter addressed to E. Byron Siens.

18. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Salt Lake City, Utah, on or about the 15th day of May, 1939, affixed fixed his signature to a letter addressed to E. Byron Siens.

19. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Los Angeles, California, on or about the 29th day of January, 1939, affixed his signature to the register of Hotel Clark, Los Angeles, California.

20. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Los Angeles, California, on or about the 21st day of February, 1939, affixed his signature to the register of Hotel Clark, Los Angeles, California.

21. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Salt Lake City, Utah, on or about the 15th day of May, 1939, affixed his signature to a letter addressed to the defendant Fischgrund.

22. In pursuance of said conspiracy and to effect the objects thereof, defendant Morgan, at Salt Lake City, Utah, on or about the 8th day of September, 1939, affixed his signature to a letter addressed to Arthur P. Adkisson.

23. In pursuance of said conspiracy and to effect the objects thereof, E. Byron Siens, at Los Angeles, California, on or about the 26th day of October, 1938, affixed his signature to a letter addressed to the defendant Morgan.

24. In pursuance of said conspiracy and to effect the objects [32] thereof, E. Byron Siens, at Los Angeles, California, on or about the 24th day of March, 1939, affixed his signature to a letter addressed to the defendant Morgan.

25. In pursuance of said conspiracy and to effect the objects thereof, J. A. Barclay, at Salt Lake City, Utah, on or about the 18th day of January, 1939, affixed his signature to a letter addressed to the defendant Collins.

26. In pursuance of said conspiracy and to effect the objects thereof, J. A. Barclay, at Salt Lake City, Utah, on or about the 11th day of February, 1939, affixed his signature to a letter addressed to the defendant Collins.

27. In pursuance of said conspiracy and to effect the objects thereof, J. A. Barclay, at Salt Lake City, Utah, on or about the 16th day of February, 1939, affixed his signature to a letter addressed to the defendant Collins.

All of which acts of said defendants and each of them were and are contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America. (Title 18 U. S. C., Section 88)

Wm. Fleet Palmer

WILLIAM FLEET PALMER

United States Attorney

By:

Assistant United States Attorney

A true bill. N. W. Keller, Foreman.

[Endorsed]: Filed Feb. 4, 1942. [33]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 15229

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. COLLINS, SIDNEY FISCHGRUND,
FRED V. GORDON, JOHN H. MORGAN and
CHRISTOPHER E. SCHIRM,

Defendants.

MOTION TO QUASH INDICTMENT

The defendant, Fred V. Gordon, hereby moves to quash the indictment heretofore found in the above entitled matter, and as a basis for the motion, respectfully shows:

I.

That the evidence adduced before the Grand Jury returning the indictment herein was insufficient and incompetent.

II.

That the evidence before the Grand Jury on the indictment herein was based on hearsay only and therefore was incompetent.

III.

That the indictment herein returned by the Grand Jury charges the defendant herein with two counts of violation of Sec. 77q of the Securities and Exchange Act, 8 counts of violation of the mail fraud statute, and one count of conspiracy to violate both the Securities and Exchange Act and the Mail Fraud statute; that there was no com-

petent evidence of any kind, or a scintilla thereof, before the Grand Jury, of the acts and things that constituted the gist of the offenses charged in Counts I to XI inclusive.

IV.

That there was no competent evidence or any evidence at all, except hearsay evidence, which is in itself incompetent evidence as [34] to the scheme or artifice to defraud, as alleged in Counts I to XI inclusive of the indictment.

V.

That the Grand Jury which returned the indictment herein was empanelled on February 4th, 1942, and on the same date, to wit, February 4th, 1942, the said Grand Jury, newly empanelled, returned seventeen (17) indictments; that by reason of the number of indictments returned, and by reason further of the length and scope of the indictment herein which consists of 32 typewritten pages, and which consists of eleven counts alleging acts, among other things, of stock market manipulations, rigging of markets, technical inter-corporate transactions, technical information in reference to oil production and representations made thereof, and other matters of like scope, it would be a physical impossibility for a grand jury to have heard other than the mere ex-parte statement of a public official detailing matters gleaned from an investigating report.

VI.

That the said defendant, Fred V. Gordon, has the constitutional right to determine what transpired before the grand jury so that his individual constitutional rights may be safeguarded, and he is entitled to inspect and examine the minutes of the grand jury in furtherance

of his motion herein to quash the indictment, and to call as witnesses on his behalf, Russell K. Lambeau, Assistant United States District Attorney, and James M. Evans, investigator for the Securities and Exchange *Division* of the United States.

VII.

Attached hereto, marked Exhibit "A", and by reference made a part hereof, is the affidavit of Ben L. Blue, in support of said motion.

Wherefore, said defendant, Fred V. Gordon, prays that his motion to quash the indictment herein be granted and that the indictment herein be dismissed and set aside, or in the [35] alternative that the defendant herein, Fred V. Gordon, be permitted to inspect and examine the minutes of the Grand Jury in furtherance of his motion to quash the indictment, and call as witnesses on his behalf, Russell K. Lambeau, Assistant United States District Attorney, and James M. Evans, Investigator for the Securities and Exchange *Division* of the United States.

BEN L. BLUE

Attorney for Defendant, Fred V. Gordon [36]

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT OF BEN L. BLUE IN SUPPORT OF MOTION TO QUASH INDICTMENT

State of California

County of Los Angeles—ss.:

Ben L. Blue, being first duly sworn, deposes and says:

That he is attorney for Fred V. Gordon, one of the defendants herein; that Fred V. Gordon was indicted by the grand jury on February 4th, 1942, charged in said indictment with two counts of violating Sec. 77q of the

Securities and Exchange Act, eight counts of violating the mail fraud statutes, to wit, Title 18, United States Code, Sec. 338, and one count of violating the conspiracy statute; that said grand jury was duly empanelled for the February Term on February 4th, 1942; that immediately after the empanelment of said grand jury, various matters were brought to its attention by the United States District Attorney's Office, and on February 4th, 1942, the said grand jury, newly empanelled, returned seventeen (17) indictments; that among the 17 indictments so returned was the indictment of the defendant in the above entitled cause.

That said indictment consists of 32 typewritten pages and charges the defendants with operating a fraudulent stock market manipulation consisting of rigging markets and manipulating the price of a stock listed on the Salt Lake Stock Exchange; said indictment also charged the defendants with having acquired certain [37] interests in oil companies operating in Los Angeles County for the benefit of the corporation whose stock was allegedly manipulated on said Exchange; said indictment also charged definite misrepresentations as to the assets of the corporations named in the indictment, as to the contemplated payment of the dividend, as to the contemplated increase in price of stock on the so-called manipulated market, and a great many other representations which are more fully set forth in said indictment, and that in furtherance of said acts, the defendant utilized the United States mails to complete the alleged scheme and artifice;

Said indictment further named certain persons who were defrauded by the defendant; that the indictment further sets forth certain letters which are alleged to have been forwarded through the United States mails to certain witnesses by the defendant;

That affiant, basing his allegation on information and belief, alleges that no witnesses appeared before the grand jury to testify in the above entitled matter except James M. Evans and Russell K. Lambeau; that James M. Evans is an investigator employed by the Securities and Exchange Commission and Russell K. Lambeau is an Assistant United States District Attorney attached to the Southern District of California;

Affiant further alleges on information and belief that the only evidence given before said grand jury in reference to the above indictment were ex-parte hearsay statements of said James M. Evans and Russell K. Lambeau, and that said evidence as given by said James M. Evans and Russell K. Lambeau was incompetent, hearsay, and therefore no evidence at all;

Affiant further alleges that said allegation on information and belief is based on the fact that it would be a physical impossibility to hear sufficient competent evidence to justify the allegations in the indictment by reason of the fact that on the same day, seventeen indictments were returned, including the [38] present one.

The within affidavit is made in support of the motion to quash the indictment herein.

BEN L. BLUE

Subscribed and sworn to before me this 25th day of February, 1942.

(Seal)

ZOA L. ZACCHE

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Motion to Quash this 26 day of February, 1942. Edward H. Law, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 26, 1942. [39]

[Title of District Court and Cause.]

MOTION TO QUASH INDICTMENT

The defendant Sidney Fischgrund, hereby moves to quash the indictment heretofore found in the above entitled matter, and as a basis for the motion, respectfully shows:

I.

That the evidence adduced before the Grand Jury returning the indictment herein, was insufficient and incompetent.

II.

That the evidence before the Grand Jury on the indictment herein, was based on hearsay only, and therefore was incompetent.

III.

That the indictment herein returned by the Grand Jury, charges the defendant herein with two counts of violation of Section 77q of the Securities and Exchange Act, 8 counts of violation of the mail fraud statute, and one count of conspiracy to violate both the Securities and Exchange Act and the Mail Fraud statute; that there was no competent evidence of any kind, or a scintilla thereof, before the Grand Jury, of the acts and things that constituted the gist of the offenses charged in Counts I to XI inclusive. [40]

IV.

That there was no competent evidence or any evidence at all, except hearsay evidence, which is in itself incompetent evidence as to the scheme or artifice to defraud, as alleged in Counts I to XI inclusive, of the indictment.

V.

That the Grand Jury which returned the indictment herein, was empanelled on February 4th, 1942, and on the same date, to wit, February 4th, 1942, the said Grand Jury, newly empanelled, returned seventeen (17) indictments; that by reason of the number of indictments returned, and by reason further of the length and scope of the indictment herein, which consists of 32 typewritten pages, and which consists of eleven counts, alleging acts, among other things, of stock market manipulations, rigging of markets, technical intercorporate transactions, technical information in reference to oil production and representations made thereof, and other matters of like scope, it would be a physical impossibility for a grand jury to have heard other than the mere ex-parte statement of a public official detailing matters gleaned from an investigating report.

VI.

That the said defendant, Sidney Fischgrund, has the constitutional right to determine what transpired before the Grand Jury so that his individual constitutional rights may be safeguarded, and he is entitled to inspect and examine the minutes of the Grand Jury in furtherance of his motion herein to quash the indictment, and to call as witnesses on his behalf, Russell K. Lambeau, Assistant United States District Attorney, and James M. Evans, investigator for the Securities and Exchange *Division* of the United States.

VII.

This motion to quash indictment is made on behalf of [41] Sidney Fischgrund, one of the defendants named herein; that there has been filed simultaneously a similar

motion to quash indictment on behalf of Fred V. Gordon, a co-defendant; that as a part of said motion to quash indictment filed on behalf of Fred V. Gordon, there has been filed as Exhibit "A" thereto the affidavit of Ben L. Blue, attorney of record for Fred V. Gordon; and in addition thereto, "Brief in Support of Motion to Quash Indictment of Fred V. Gordon." Reference is made to said affidavit of Ben L. Blue and said "Brief in Support of Motion to Quash Indictment of Fred V. Gordon," and the same and each of them are by reference made a part of the motion herein filed on behalf of the defendant, Sidney Fischgrund.

Wherefore, said defendant, Sidney Fischgrund, prays that his motion to quash the indictment herein be granted, and that the indictment herein be dismissed and set aside, or in the alternative, that the defendant herein, Sidney Fischgrund, be permitted to inspect and examine the minutes of the Grand Jury in furtherance of his motion to quash the indictment, and call as witnesses on his behalf, Russell K. Lambeau, Assistant United States District Attorney, and James M. Evans, Investigator for the Securities and Exchange *Division* of the United States.

HARRY GRAHAM BALTER

Attorney for Defendant, Sidney Fischgrund

Received copy of the within Motion to Quash this 2nd day of March, 1942. Wm. Fleet Palmer, U. S. Atty.: R. K. Lambeau, Ass't. U. S. Atty.

[Endorsed]: Filed Mar. 2, 1942. [42]

[Minutes: Monday, March 2, 1942]

Present: The Honorable Harry A. Hollzer, District Judge.

This cause coming on for arraignment and plea of defendant John H. Morgan, plea of defendants Collins, Fischgrund, and Schirm, and for hearing motion of defendant Fred V. Gordon to quash indictment; R. K. Lambreau, Assistant U. S. Attorney, appearing as counsel for the Government; David H. Cannon, Esq., appearing as counsel for Defendant Morgan; Chas. H. Heustis, Esq., appearing as counsel for Defendant Collins; Ben L. Blue, Esq., appearing as counsel for Defendants Schirm and Gordon; Harry G. Balter, Esq., attorney for Defendant Fischgrund being absent; all of the said defendants being present; and A. Wahlberg, Court Reporter, being present and reporting the proceedings:

Attorney Cannon in behalf of Defendant Morgan waives reading of the Indictment and enters plea of not guilty to all eleven counts. It is ordered that Defendant Morgan have thirty days in which to withdraw his plea for the purpose of entering a different plea.

Attorney Blue states that Defendant Schirm wishes to join in motion of Defendant Gordon to quash indictment and that Attorney Balter, counsel for Defendant Fischgrund, has asked him to advise the Court that Defendant Fischgrund wishes to join in said motion, and it is so ordered, and it is further ordered that hearing on said motion is continued hereby to March 12, 1942, at 10 A. M. and continued hereby to March 16, 1942, at 2 P. M. for assignment and setting as to Defendant Morgan and for plea of remaining defendants. [43]

[Minutes: Monday, March 16, 1942]

Present: The Honorable Harry A. Hollzer, District Judge.

This cause coming on for (1) decision on motion to quash indictment of Defendants Gordon, Fischgrund, and Schirm; (2) plea of Defendants Collins, Fischgrund, Schirm, and Gordon; and for assignment and setting for trial as to Defendant Morgan; R. K. Lambeau, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. H. Heustis, Esq., appearing as counsel for Defendant Collins; Harry G. Balter, Esq., appearing as counsel for Defendant Fischgrund for purpose of plea only; Ben L. Blue, Esq., appearing as counsel for Defendants Gordon and Schirm, and also in place of David H. Cannon, Esq., as counsel for Defendant Morgan; and Arthur Edwards, Court Reporter, being present and reporting the proceedings:

It is ordered that motion to quash be and it hereby is, denied and exception noted to moving defendants. Defendants Collins, Fischgrund, Schirm, and Gordon waive reading of the Indictment, and each enters plea of not guilty to all eleven counts.

It is ordered that the cause be referred to Judge McCormick forthwith for assignment and setting. [44]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now Come the defendants above named and move the court to dismiss the indictment heretofore found against them and as grounds for said motion, said defendants allege as follows:

I.

That the constitutional rights of the defendants as granted to them by Amendment 6 of the Constitution of the United States, have been denied in that they have not enjoyed the right to a speedy trial.

II.

That these defendants were indicted on February 4, 1942, and said indictment contained eleven counts, two counts of which charged them with violation of Section 77q (a) (1), Title 15, U. S. C., eight counts of violation of Title 18, U. S. C., Section 338 (mail fraud), and one count of conspiracy to violate each of the sections above enumerated. They were duly arraigned and other proceedings taken as appears more definitely from the chronological table attached hereto, marked Exhibit "A", and by reference made a part hereof.

III.

The indictment charges that the defendants, commencing in 1938 and ending in 1939, committed the acts set forth.

IV.

The cause was set for trial before the Honorable Benjamin [45] Harrison, District Judge, for June 4, 1942, at which time all of the defendants were present in person and represented by their attorneys ready for trial.

At said time, H. V. Calverley, Assistant United States Attorney, appearing as counsel for the government, addressed the court and stated that he had written for authority from the Attorney General to dismiss the case by reason of the fact that his examination of the files, records, statements, convinced him that there was not sufficient evidence to convict and that justice would be served by a dismissal. The court thereupon continued the cause for the term for setting.

V.

Thereafter, said cause was continued from term to term, to wit: from the September term of 1942 to the February term of 1943; and in the September term of 1943, said cause was continued until October 18, 1943, for the purpose of setting for trial, at which date it was continued again for the term. On February 7, 1944, on which day the February term calendar was called, the case was set for trial for April 18, 1944, and on March 13, 1944, on the court's own motion, it was ordered that the order setting the cause for trial for April 18, 1944, be vacated, and the cause was transferred to Presiding Judge Paul J. McCormick for re-assignment. The latter motion and order was made without the appearance or consent of the defendants. Thereafter, in the courtroom of Judge Harry Hollzer, the matter was set for July 5, 1944, and Judge Dave W. Ling of Arizona was assigned as Trial Judge.

VI.

By reason of the delay, through no fault of the defendants and for no valid reason on the part of the plaintiff, these defendants have been deprived of the right to subpoena certain witnesses in their defense, as will more fully appear from the affidavit of Fred V.

Gordon, one of the defendants herein, which affidavit is attached hereto, marked Exhibit "B", and by reference made a part [46] hereof.

VII.

The defendant, James H. Collins, by reason of the delay, has been placed in the position of not being in possession of necessary documentary evidence which was entrusted by him with his former attorney, Charles H. Heustis, as will more fully appear by the affidavit of James H. Collins, which affidavit is hereto attached, marked Exhibit "C", and by reference made a part hereof.

The defendant Collins did at the time of his arrest, consult with and retain Charles H. Heustis, an attorney-at-law, with offices at Los Angeles, California, and did turn over to said Heustis all of his files, records, documents, letters, papers, notes, and all matters relevant to his association in the enterprise described in the indictment. Subsequently, said Heustis was inducted into the United States Army, and as will more fully appear from the affidavit, every effort has been made to obtain from Heustis the files deposited with him by Collins. That the defendant Collins, if compelled to go to trial, will be in no position to properly defend himself by reason of the absence of his records and by reason of the fact that he has been denied a speedy trial.

VIII.

Attached hereto, marked Exhibit "D", and by reference made a part hereof, is a replica of three minute orders of the court dated respectively June 4, 1942, September 13, 1943 and March 13, 1944.

IX.

Attached hereto, and by reference made a part hereof, is an affidavit of Sidney Fischgrund, marked Exhibit "E".

X.

Attached hereto, and by reference made a part hereof, is an affidavit of Thomas Morris, attorney for James H. Collins, and marked Exhibit "F".

XI.

Attached hereto also are Points and Authorities in support of the motion herein made. [47]

Wherefore, defendants pray that they be hence dismissed on the grounds that their constitutional rights have been violated.

DAVID H. CANNON

Attorney for John H. Morgan

THOMAS MORRIS

Attorney for James H. Collins

SIDNEY FISCHGRUND

In Pro Per

BEN L. BLUE

Attorney for Fred V. Gordon and
Christopher E. Schirm [48]

EXHIBIT "A"

United States of America vs. Collins, et al.

No. 15229

Proceedings as taken from register in the above-entitled action:

February 4, 1942 —Entered order filing indictment.

February 5, 1942 —Appearance of defendants.

March 16, 1942 —Entered order setting cause *of* trial with jury June 9, 1942.

May 5, 1942 —Entered order resetting and advancing trial from June 9, 1942, to June 4, 1942.

June 4, 1942 —Entered order continuing for term for setting trial. United States Attorney stated, "Application for authorization to dismiss has been made to Attorney General."

September 14, 1942—Entered proceedings and order striking from calendar for setting for trial.

September 13, 1943—Entered proceedings and order continuing to October 11, 1943, 10 A. M., for setting trial.

October 18, 1943 —Entered order continuing term for setting for trial.

February 7, 1944 —Entered proceedings and order setting for trial April 18, 1944, 10 A. M.

- March 13, 1944 —Entered order vacating trial date April 18, 1944, and transferring to Judge McCormick for re-assignment. Order entered transferring cause to division of Judge Hollzer for all further proceedings.
- March 20, 1944 —Entered order continued to April 3, 1944, 10 A. M. for setting.
- April 3, 1944 —Entered order for trial for July 5, 1944, 10 A. M. before Judge Ling. [49]

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT OF FRED V. GORDON IN SUPPORT
OF MOTION FOR DISMISSAL

State of California

County of Los Angeles—ss.:

Fred V. Gordon, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled cause; that as necessary witnesses for his proper defense, it was his intention to cause to have subpoenaed and testify on his behalf, M. H. Soyster, Christian Vrang and W. S. Milliner.

That M. H. Soyster is a Petroleum Engineer and if called to testify would have qualified as a Petroleum Engineer and Geologist, and particularly in reference to the Torrance Oil field. That the Plymouth Oil Company, of which affiant was president, drilled three wells in said

Torrance oil field on the recommendation of M. H. Soyster.

That Christian Vrang, if called upon to testify would have testified that he was a Petroleum Geologist and Engineer; that he recommended to the Plymouth Oil Company that it acquire 10 parcels of property in what was known as the Factory Center Tract west of the Torrance field.

That W. S. Milliner was the lessee of a certain oil and gas lease comprising 40 acres, in which lease affiant was one of the [50] lessors; that said 40 acres were located in Kern County, California; that subsequently, said 40 acre lease was assigned to Union Associated Mines Company and on information and belief, affiant alleges that said Milliner received 235,000 shares of Union Associated Mines Company stock for said assignment.

That all of the facts and circumstances regarding the assignment of the lease from Milliner to Union Associated Mines are only within the knowledge of said Milliner, and said Milliner is a necessary witness for affiant's proper defense.

That said Milliner, Soyster and Vrang, during the year 1942, were residents of Southern California; that since June 1942, Christian Vrang, M. H. Soyster and W. S. Milliner are unavailable to the defendant for the service of subpoenas to appear on his behalf at the trial of this cause.

Christian Vrang is in the armed services of the United States government with his actual whereabouts unknown to affiant.

W. S. Milliner is, according to the information of affiant, in the United States Navy, destination unknown.

Your affiant has mailed several letters to Milliner since

June 1942, to Milliner's last known address at San Diego, California, and all such mail has been returned to your affiant.

Affiant has attempted to located M. H. Soyster in the County of Los Angeles, but has not been able to do so and affiant alleges on information and belief that M. H. Soyster is connected with the United States Geological Survey working out of Roswell, New Mexico.

By reason of the delay in time in setting the cause for trial, the witnesses above enumerated, necessary for the proper defense of the defendant, are unavailable for him in his defense.

FRED V. GORDON

Subscribed and sworn to before me this 28th day of June, 1944.

(Seal)

ZOA L. ZACCHE

Notary Public in and for the County of Los Angeles,
State of California [51]

EXHIBIT "C"

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES H. COLLINS IN SUPPORT OF MOTION FOR DISMISSAL

State of California

County of Los Angeles—ss.:

James H. Collins, being first duly sworn, deposes and says:

That he is one of the defendants in the above titled cause; that at the time that he was indicted in February, 1942, he retained as his attorney, Charles H. Heus-

tis to represent him during the proceedings herein contemplated; that at the time that he retained said Heustis, affiant did turn over to said Heustis all of his files in reference to affiant's connection with the matter wherein he has been indicted, said files containing all of his correspondence, contracts, records of sales and purchases, confirmations of sale and purchase, showing the course of his conduct in full detail at all times.

That affiant was present in court on June 4, 1942, and his attorney was present with him, which date was the date set for the trial of the above titled cause, and at said time and place, H. V. Calverley, Assistant United States Attorney, stated that it was his desire to dismiss the case and that he had written for authority from the Attorney General to dismiss; that thereupon, his attorney Heustis, told affiant that affiant had nothing to worry about and [52] that the case would never be brought to trial, and affiant did not attempt to contact his attorney until sometime in October, 1943, at which time he was notified that the case would be heard in the courtroom of Judge Benjamin Harrison on October 18, 1943, for the purpose of setting it for trial.

Affiant attempted to find Heustis thereafter and contacted his office and was informed that Mr. Heustis had left the office and left no forwarding address. Affiant thereupon contacted the State Bar of California and a representative of the State Bar informed affiant that Mr. Heustis resided at 3411½ Larga Street, Los Angeles, California; that affiant found at that address the wife of Mr. Heustis and Mrs. Heustis told affiant at that time that Heustis was in the United States Army and gave to affiant his forwarding address; that his address at that time was at Fort Custer, Michigan; that affiant immediately addressed a letter to Heustis at the address

given to him by Mrs. Heustis, and thereafter, in March, 1944, affiant received a reply to his letter wherein Heustis stated that he, Heustis, would have his file forwarded to him and that he would extract from said file certain personal correspondence and matters that were still in the file and that after extracting his personal correspondence and other documents that had no relevance to the file, he would forward the file to affiant.

That affiant has not heard from Heustis since that time; that in the letter that affiant addressed to Heustis, he stated to Heustis that the case was going to be set for trial and that it would be necessary for him to retain another lawyer and it was also necessary for the lawyer succeeding Heustis to familiarize himself with the facts as exemplified by the documentary evidence in the possession of Heustis.

That by reason of the delay of the trial, your affiant has been deprived and is now deprived of documents and evidence necessary for his defense. [53]

That if affiant had not been lulled into a sense of security by reason of the statement made by the Assistant United States Attorney on June 4, 1942, to the effect that the case would be dismissed, and the statement of his then counsel, Heustis, to the effect that he would never be tried, he would have been able to avail himself of the evidence and also avail himself of the processes of this court. By reason of this delay, he has been denied the opportunity.

Wherefore, affiant prays that the petition to dismiss be granted.

JAMES H. COLLINS

Subscribed and sworn to before me this 28th day of June, 1944.

(Seal)

ZOA L. ZACCHE

Notary Public in and for the County of Los Angeles,
State of California [54]

EXHIBIT "D"

[Minutes: Thursday, June 4, 1942]

Present: The Honorable Benjamin Harrison, District Judge.

This cause coming on for trial of defendants James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan, and Christopher E. Schirm; H. V. Calverley, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. H. Heustis, Esq., appearing as counsel for Defendant Collins; Ben Blue, Esq., appearing as counsel for Defendants Schirm and Gordon; Sidney Fischgrund, Esq., defendant, being present in propria persona; and David H. Cannon, Esq., appearing as counsel for Defendant Morgan; all of the said defendants being present; and Mack Racklin, Court Reporter, being present and reporting the proceedings:

Attorney Calverley moves for a continuance of this case and states that he has written for authority from the Attorney General to dismiss the case.

Attorney Cannon makes a statement and Attorney Blue makes a statement.

It is ordered that the cause be, and it hereby is, continued for the Term for setting for trial. [55]

EXHIBIT "D"

[Minutes: Monday, September 13, 1943]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for setting for trial of the defendants herein; C. H. Carr, Esq., United States Attorney, appearing for the Government; Attorney Carr makes a statement, and it is ordered that this cause, be and it hereby is, continued four weeks at 10 A. M. for setting for trial. [56]

EXHIBIT "D"

[Minutes: Monday, March 13, 1944]

Present: The Honorable Ben Harrison, District Judge.

On the Court's own motion, it is hereby ordered that the order setting this cause for trial April 18, 1944, at 10 A. M. is vacated, and the cause is ordered transferred to Judge McCormick for re-assignment. [57]

EXHIBIT "E"

[Title of District Court and Cause.]

AFFIDAVIT OF SIDNEY FISCHGRUND IN SUPPORT OF MOTION FOR DISMISSAL UNDER UNITED STATES CONSTITUTION, ARTICLE VI.

State of California

County of Los Angeles—ss.

Sidney Fischgrund, being first duly sworn, deposes and says:

That on February 4, 1942, an order was entered in the above-entitled matter for filing an indictment against this affiant and the other defendants named in the above-entitled action;

That on February 5, 1942, this affiant surrendered himself to the United States Marshal and was released by the Court on his own recognizance;

That on March 16, 1942, the above-entitled action was set for trial for June 9, 1942;

That on May 5, 1942, an order was entered resetting and advancing the trial date from June 9, 1942, to June 4, 1942;

That on June 4, 1942, when the defendants were ready for [58] trial, the United States Attorney stated that the United States Government would move for a dismissal of the action, and had filed application for authorization to the United States Attorney General, and that he believed the action would be dismissed because there was insufficient evidence to justify the prosecution of this action, and that he requested a continuance for the term;

That on September 13, 1942, an order was entered striking the action from the calendar for setting;

That on September 13, 1943, (one year from the previous date) an order was entered continuing the above-entitled action for setting to October 11, 1943;

That on October 18, 1943, an order was entered continuing the setting of the above-entitled action for the term;

That on February 7, 1944, an order was entered setting the above-entitled action for trial on April 18, 1944;

That on March 13, 1944, an order was entered vacating the trial set on April 18, 1944, and transferring the case to Judge McCormick for re-assignment. Thereafter, an order was entered transferring the cause to Judge Hollzer for further proceedings;

That on March 20, 1944, an order was entered continuing the case to April 3, 1944, for setting;

That on April 3, 1944; an order was entered setting the case for trial for July 5, 1944.

From the foregoing, it appears that the criminal prosecution was suspended over this affiant and the other defendants for almost two and one-half years, and that during that period of time this affiant and the other defendants constantly were under oppression, anxiety and harassment.

That at the time the indictment was filed, the prosecution was ready for trial inasmuch as at that time it had accumulated all of the facts, obtained statements from all of the witnesses, [59] obtained the Exhibits which it now possesses, and that the prosecution could have been ready for trial within sixty days. That this affiant was ready for trial on June 4, 1942, when the action was first set for trial.

That this action has been delayed merely because of the whim and caprice of the attorneys for the Securities and Exchange Commission, who have resisted the dismissal of this action from the very beginning, and if said attorneys for the Securities and Exchange Commission knew that the above-entitled action would not be dismissed because of their insistence that the case be brought to trial, it was their duty to the Court and to the defendants to advise the Court and *that* defendants that no dismissal would be approved or authorized, in order not to lull the defendants into a false sense of security.

That the acts of which this affiant and the other defendants are accused, are alleged to have taken place between June, 1938, and December, 1939, which is almost

six years ago, and it is impossible for this affiant to now remember all of the facts and circumstances surrounding the numerous transactions which took place in his office five and six years ago.

That prior to the last continuance, the Honorable Ben Harrison, Judge Presiding in the above-entitled Court, stated to the United States Attorney, "This case has been bandied around on the calendar, and if there is any reason this case is not going to be tried at that time—why, it is going to be tried at that time or will be disposed of by the Court."

That after the foregoing statement was made by the Court, the above-entitled action was continued twice, and this affiant objected to the continuance and stated to the Court that he objected to the continuance; nevertheless, over the objections of this affiant, the cause was continued.

That this affiant has been deferred from military service [60] in the Army of the United States Government because of the pendency of this above-entitled action; that although this affiant has endeavored to join the United States Navy, he has been precluded from serving his country. That this affiant will be 38 years of age on August 16, 1944, and because of his age, he will be prevented and precluded from serving in the armed services of the United States Government after that date, while he is informed and believes that if he can enlist in the armed services of the United States prior to August 16, 1944, he will be accepted.

Wherefore, this affiant respectfully prays that his motion to dismiss the indictment and complaint filed in the above-entitled cause be granted on the ground that he

has been denied a speedy trial as guaranteed to him by the Sixth Amendment to the Federal Constitution.

SIDNEY FISCHGRUND

Affiant

Subscribed and sworn to before me this 28th day of June, 1944.

(Seal)

WILLIAM R. LAW

Notary Public in and for the County of Los Angeles,
State of California [61]

EXHIBIT "F"

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS MORRIS

State of California

County of Los Angeles—ss.

Thomas Morris, being first duly sworn on oath, deposes and says:

That on or about the 17th day of April, 1944, he made an appearance as attorney for defendant, James Collins, one of the defendants in the above cause, and prior thereto had no knowledge or information of the matters set forth in the indictment nor the defense of said defendant thereto.

That prior to said date, said defendant had been represented in the above cause by C. H. *Hustis*, an attorney at law duly licensed to practice in the above court; that said *Hustis* had, sometime previous to said date, been inducted into the armed forces of the United States. [62]

That James Collins informed affiant that all his files, records, papers and memoranda pertaining to the defense

in the above action had been handed to and were in the possession of said *Hustis*.

That thereafter and on the 9th day of May, 1944, your affiant addressed a letter to the said *Hustis*, a copy of which is attached hereto, marked Exhibit A, which letter was not returned to affiant.

That thereafter and on or about the 6th day of May, 1944, your affiant addressed a letter to the said *Hustis*, a copy of which is attached hereto, marked Exhibit B, which said letter was registered with return receipt requested and said return receipt is attached to Exhibit B.

That on the 7th day of June, 1944, your affiant addressed a letter to the wife of said *Hustis*, Mrs. C. H. *Hustis*, at 3411½ Larga Street, California, a copy of which said letter is attached hereto, marked Exhibit C, which said letter was not returned to affiant.

That your affiant received no reply to any of said letters.

That on or about 22nd day of June, 1944, your affiant received a letter from Charles H. *Hustis*, postmarked Greenville, Pennsylvania, stating in substance that he had not received any of the letters from affiant but inferring that he received the last letter written to him by affiant, and stating therein that James Collins was indebted to him, *Hustis*, and that he had written Collins telling him that he "could have the file ready for him in several weeks time, as there were other papers in the file which had to be taken out—This will involve being done by remote control with time and trouble involved. I have assumed that this matter had been dismissed as to Collins so the file I placed with my dead files." He stated that he hoped Collins would get a certain sum of money started on its way to him and he would see to [63] his file.

That the inference contained in said letter is that he would not see to said file getting to Collins unless said sum of money was forthcoming. That Collins has advised your affiant that he is not indebted to *Hustis* in any sum of money whatsoever.

That by reason of the delay in said correspondence and the failure of your affiant to receive the file, your affiant has been unable to avail himself of any of the files, records, papers, and memoranda pertaining to the defense in the above action and for these, and the reasons stated in the Motion to Dismiss herein, your affiant is wholly unable to prepare the defense of the defendant, Collins.

THOMAS MORRIS

Affiant

Subscribed and sworn to before me this 28th day of June, 1944.

(Seal)

TEMPE CURRIE

Notary Public in and for said County and State.

My Commission expires June 8, 1947. [64]

Exhibit A

May 9, 1944.

Private C. H. *Hustis*,
No. 39712848, Army Service Forces,
Sixth Service Command,
Company D, 28th Batt., 1671st S. U.,
Fort Custer, Michigan.

Dear Sir:

Mr. James Collins has asked me to write you for the papers and documents relating to the federal action in which you formerly represented him.

The case is set for July 5th and I have appeared of record and I am, of course, becoming anxious to see the file and familiarize myself with the case.

I would deeply appreciate your seeing to it that these papers are forwarded to me at the first possible moment. I would also appreciate anything you can tell me about the case.

Very truly yours,
THOMAS MORRIS.

TM:TC [65]

Exhibit B

June 6, 1944.

Private C. H. *Hustis*,
No. 39712848, Army Service Forces,
Sixth Service Command, Company D,
28th Battalion, 1671st S. U.,
Fort Custer, Michigan.

Dear Mr. *Hustis*:

Mr. James Collins, whom you formerly represented in the matter in which he was indicted, and I have both written you on previous occasions seeking your co-operation in locating his files and papers which were in your possession at the time you closed your office. Mr. Collins tells me that you have all the papers and that he has none which would be of assistance to me in preparing his defense for the trial which is now set for July 5th, 1944.

I have practically no knowledge or information of the facts in the case and especially of those which might be deduced from his papers, and will be completely without resources to defend him unless these are made available to me by you, and, even at this late date, you can appre-

ciate that with the problem of carrying on my legal practice, it will be a most onerous task to prepare myself to defend Jim.

We have not heard from you and both of us appreciate that you are, perhaps, placed in some position which renders it exceedingly difficult for you to comply with our request and, also, that this matter is by this time, perhaps, far removed from the sphere of your activity.

I am sure you appreciate the urgent necessity which prompts my request for these files and we will deeply appreciate getting some response from you and, of course, the files, at the earliest possible moment. [66]

Very truly yours,

THOMAS MORRIS.

TM:TC

— — — — —
Post Office Department

Official Business

Penalty for private use to avoid payment
of postage, \$300.

Postmark of Delivering Office

2 Battle Creek Mich.

Jun 10

9:30 PM

1944

Return to Thomas Morris Atty

Street and Number,)

of Post Office Box,) 412 W. 6th

Registered Article

Los Angeles, 14

No. 228169

California.

Insured Parcel

No.
— — — — —

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. C. H. *Hustis*

(Signature or name of addressee)

2. Cpl Jack Mahler

(Signature of addressee's Agent—Agent should enter addressee's name on line One above)

Date of Delivery Jun 10 1944, 194.... [67]

Exhibit C

June 7, 1944.

Mrs. C. H. *Hustis*,
3411½ Larga Street,
Los Angeles, California.

Dear Mrs. *Hustis*:

Recently I was substituted as attorney for James Collins in an action pending against him in the federal court in which proceeding he was formerly represented by your husband. Mr. Collins has been endeavoring to procure the file which was in your husband's possession at the time he entered the army, and among other things, he has endeavored to telephone you on several occasions at Normandie 18758 and informs me that he has been unable to reach you. We have written to your husband at the following address,

Private C. H. *Hustis*,
No. 39712848, Army Service Forces,
Sixth Service Command,
Company D, 28th Batt., 1671st S. U.,
Fort Custer, Michigan,

but have not had a reply from him although our letters have not been returned. If you have another and more recent address than the one above, we would appreciate very much your communicating it to us.

We would also appreciate any assistance you could give us in the matter of locating the file and respectfully request that you telephone me at the office at TRinity 0457 immediately upon receipt of this letter.

Very truly yours,

THOMAS MORRIS.

TM:TC [68]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES

Amendment Six of the Constitution of the United States reads as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *”

The wording of the Sixth Amendment is clear and implicit. The question is, what is a speedy trial. Congress has not in its legislative actions set forth a definite time limitation so that the question of what a speedy trial constitutes must be determined by what is reasonable and by precepts of example and by what other legislative bodies have determined constitute a time limit within which to bring defendants to trial.

The legislature of the states of California and Arizona have determined that unless a defendant is brought to trial within sixty days after an indictment or information has been found, that the defendant must be dismissed.

In the case of *Harris v. Municipal Court*, 209 Cal. 55, the court says:

"Section 13 of article I of the Constitution of California provides in part as follows: 'In criminal prosecutions, in any court whatever, the party accused shall have the right to a [69] speedy and public trial.' This provision of the Constitution is self-executing. (*In re Alpine*, 203 Cal. 731 (58 A. L. R. 1500, 265 Pac. 828); *In re Begerow*, 133 Cal. 349 (85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828). It reflects the letter and spirit of the following provision of the federal Constitution to the same effect: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ' (U. S. Const., art. VI, sec. 1.) This is a fundamental right granted to the accused and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act. (*In re Begerowa*, *supra*.) The policy of the law in this respect has been further declared by the legislature and by constitutional amendment in this state. * * *

". . . It will thus be seen that the time within which criminal cases should be disposed of has been and is a matter of great public concern, and the duty is imposed upon courts, judicial officers and public prosecutors, to expedite the disposition thereof.

"What is a 'speedy trial,' as those words are used in the Constitution? The legislature in section 1382 of the Penal Code has declared that unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the

prosecution. Thus the legislature by necessary inference has said that a trial delayed more than sixty days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision."

It is true that there are several United States Circuit Court cases, particularly the case of *Phillips v. United States*, 201 Fed. [70] 259, and *Worthington v. United States*, 1 Fed. (2d) 154, which hold that in order for a defendant to avail himself of the right given under Amendment VI, that it is incumbent upon him to demand a trial and if he does not do so, that then he waives the right. That theory does not apply in the present cause.

In this case, these defendants appeared in court ready for trial two years and one month ago, at which time the Assistant United States District Attorney stated in open court that there was not sufficient evidence to convict and moved for a dismissal subject to the rule of the office to receiving permission from the Attorney-General in Washington. By his statement to the court, the defendants were lulled to a point of inactivity. The assumption was natural that the consent of the Attorney General in view of the recommendation of his representative, was unquestioned.

The situation that the defendant Collins finds himself in today is a glaring example of what was a natural sequence of the statement of the District Attorney. The fact that since the motion was made, witnesses necessary for the proper defense of the case are now in the Army and unavailable as witnesses, is another natural sequence of the delay in the case. We must face the actual fact that the memories of man are frail and that

the facts attempted to be adduced in this particular cause are facts that took place in 1938, commencing about the month of August, and continuing until about March or April of 1939. Either the witnesses will have forgotten conversation or their memories will concoct imaginative facts in line with what they thought happened but what most likely did not happen.

The right to a speedy trial as that right is granted under the Constitution, was given because Congress and the people recognized that an accusation of crime is serious; that it affects the reputation of the man accused; that it should be speedily disposed of so that if an innocent man is charged with a crime, he may be exculpated promptly and not be questioned by reason of the indictment [71] or charge. It was also included as a constitutional amendment by reason of the fact that it was recognized that unless a man was tried with reasonable diligence as far as time was concerned, that witnesses would forget the facts surrounding the matter; that witnesses would be unavailable or could not be located; that witnesses might die.

In the case of *United States ex rel. Whitaker v. Henning*, 15 Fed. (2d) 760, the court, in considering whether mandamus would apply requiring the trial of a man who at the time of the petition was incarcerated in the federal penitentiary, states on page 761;

"The reason for the majority rule is well stated in *State v. Keefe*, 17 Wyo. 227, 98 P. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161: 'The right of a speedy trial is granted by the Constitution to every accused. A convict is not excepted. He is not only amenable to the law, but is under its protection as

well. No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect inflict upon him an additional punishment for the offense of which he has been convicted. At the time of defendant's trial upon the one information, he was under the protection of the guaranty of a speedy trial as to the other. It cannot be reasonably maintained, we think, that the guaranty became lost to him upon his conviction and sentence, or his removal to the penitentiary. Possibly in his case, as well as in the case of other convicts, a trial might be longer delayed, in the absence of a statute controlling the question, than in the case of one held in jail merely to await trial, without violating the constitutional right, for an acquittal would not necessarily terminate imprisonment. However, the purpose of the provision against an unreasonable delay in trial is not solely a release from imprisonment in the event of acquittal, but also a release from the harrassment of a criminal prosecution and the anxiety [72] attending the same; and hence an accused admitted to bail is protected as well as one in prison. Moreover, a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that defendant is serving a sentence in the penitentiary for another crime." See, also, *Frankel v. Woodrough* (C. C. A.), 7 F. (2d) 796, and the cases there cited."

A speedy trial is one had as soon after indictment as the prosecution can with reasonable diligence prepare for it, regard being had to the terms of court; a trial conducted according to fixed rules, regulations and proceed-

ings of law free from vexatious, capricious and oppressive delays.

22 Corpus Juris Secundum 716

People v. Molinari, 67 Pac. (2d) 767 (Cal.)

State v. Carrillo, 16 Pac. (2d) 965, 41 Ariz. 170

Von Feldstein v. State, 17 Ariz. 245, 150 Pac. 235

It is our contention that it is not the duty of the defendants to ask that the case be tried as is held in the Phillips case. When a defendant is charged with a crime by indictment, it is incumbent upon the government to follow the letter and spirit of the law. It is not incumbent upon the defendant to point out to the government its failure to comply with the spirit and letter of the law, as well as the explicit wording of the Constitution. The onus is on the government, not on the defendants. If it were otherwise, an indictment could be pending against a man for a lifetime.

Enlarging upon the above thought, the court states in State v. Carrillo, 41 Ariz. 170, as follows:

“ . . . As we read the law, defendant is not required to request a trial. He is not the moving party. It is the state that initiates the accusation, and any delay in its [73] prosecution, except for most cogent reasons, is not contemplated or justifiable. If the state can excuse itself for not bringing the accused to trial, then the onus for celerity is shifted to the accused. There is no intimation in the law that the accused must request a trial before he may claim the right to be dismissed for failure on the part of the state to bring on the prosecution within the limit fixed by law. If the trial is postponed for any reason other than some cause attributable to the accused, in the absence of a showing of good cause for the postponement, it must be dismissed.”

When an established procedure is departed from, it may, as in the instant case, lead to the impairment of substantial rights of the defendants. All substantial rights belonging to defendants should be respected. If a substantial right of a defendant is not respected, the same procedure applied to all men placed in the same position would illegally deprive defendants of life and liberty. It is necessary for the protection of all men that we do not have one procedure for one defendant and another procedure for another defendant. To say that in one case defendants may not be brought to trial for years after an indictment has been found and in another case to have a judge require the defendant to go to trial within one week after an indictment is found, is not proper procedure.

Based on the facts as shown in this case, and if this procedure were to be permitted, a court would have little defense if an attorney were to say, "I wish continuance after continuance for term after term by reason of the fact that it was done in a case titled, *United States v. Collins, et al.*" If the government can act as it does in the instant case, it can act that way in every case.

We believe that particularly appropriate statement found in the late case of *People v. Rodriguez*, 58 Cal. App. (2d) 424, 425: [74]

"We find particularly appropriate in this connection remarks of former Chief Justice Bleckley of the Supreme Court of Georgia, delivered to the Georgia Bar Association and printed in its annual report (1886) as follows: 'Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them.

That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a court to stray from justice of procedure in order to administer justice of substance.'"

We believe that justice of procedure requires a dismissal of these defendants. [75]

Received copy of the within Motion to Dismiss together with exhibits mailed to Judge Dave W. Ling, Federal Bldg., Phoenix, Ariz., on June 28th, 1944. Ben L. Blue.

[Endorsed]: Filed Jun. 29, 1944. [76]

[Title of District Court and Cause.]

AFFIDAVIT OF SIDNEY MANSTER IN
OPPOSITION TO MOTION TO DISMISS

State of California

County of Los Angeles—ss.

Sidney Manster being duly sworn deposes and says:

That deponent is an attorney at law presently employed by the Securities and Exchange Commission and deputized by the Department of Justice as Special Assistant to the United States Attorney for the Southern District of California to assist in the trial of the above-entitled case. The deponent's authority to serve in this capacity is duly filed with the Clerk of this Court. [77]

This affidavit is submitted in opposition to a motion by the defendants to dismiss the indictment herein, which motion is set for hearing in this Court on July 3, 1944, before the Honorable Dave W. Ling. Deponent was served with a copy of the motion papers on June 29, 1944.

The motion for dismissal of the indictment is predicated upon violation of Article 6 of the Constitution of the United States, in that the defendants have been deprived of their rights to a speedy trial.

It should be noted that this motion is made within a week of the date set for trial, July 5, 1944, and after the Government had subpoenaed numerous witnesses residing outside the State of California. No previous application for the relief herein prayed for, and upon these grounds, has been made in this case.

The defendants contend in the affidavits and exhibits in support of this motion that they are prejudiced by a trial at this time for the following reasons:

(1) The unavailability of certain witnesses; (2) the defendant Collins has been unable to obtain certain documents alleged to be in the possession of his former attorney; (3) the prosecution was delayed by the "whim and caprice of attorneys for the Securities and Exchange Commission," who lulled the defendants into a false sense of security by failing to advise the court and defendants that a dismissal of the action would not be approved.

These contentions will be considered in the above order:

(1) The affidavit of the Defendant Fred V. Gordon verified June 28, 1944, states that it was his intention to subpoena as witnesses in his behalf certain individuals whom he claims are now unavailable. Two of these persons, namely Mr. M. H. Soyster and Mr. Christian Vrang, are geologists, and the third, Mr. W. S. Millener, is named as a lessee of a certain oil and gas lease which was assigned to the Union Associated Mines Company.

Gordon's affidavit states that "M. S. Soyster is connected [78] with the United States Geological Survey working out of Roswell, New Mexico." It would, therefore, appear that Mr. Soyster can be located; that he is not outside the process of this court, and that he can be available as a witness if due diligence is exercised to procure his attendance.

In regard to the proposed witness Christian Vrang, Gordon's affidavit states that he "is in the Armed Services of the United States Government with his actual whereabouts unknown to affiant."

Deponent avers that at the time of the investigation, conducted prior to the return of the indictment herein, Christian Vrang was furnished office space and facilities by the defendant Gordon, and was known to have been a business associate of Gordon for a number of years. It further appears that a daughter of Christian Vrang now resides at 280A St. Joseph Street, Long Beach, California, and that she may be in a position to furnish her father's present address.

The defendant Gordon's affidavit fails to establish that reasonable diligence was exercised to locate and subpoena the proposed witnesses, Soyster and Vrang. Furthermore, it does not appear that the testimony to be given by these witnesses is within their exclusive knowledge or opinion, or that other witnesses could not be called upon to furnish equivalent testimony. The cryptic statement, in the defendant Gordon's affidavit, of the participation of Messrs. Soyster and Vrang in connection with the charge in the indictment would indicate that they were to testify as geologists and give opinion evidence with regard to the merits of certain oil fields.

In reference to the proposed witness W. S. Millener, there is no statement in Gordon's affidavit which supports the materiality of Millener's testimony. It is merely alleged that on information and belief Millener received 235,000 shares of Union Associated Mines Company stock for his assignment to that company of a certain oil and gas lease covering forty acres in Kern County, California.

Information contained in the Government's files in this case discloses that on December 28, 1940, William S. Millener executed [79] an affidavit wherein he stated, in part, as follows:

"United States of America
District of Columbia—ss.

"William S. Millener, being duly sworn, deposes and says that:

"During the fall of 1938 and the early part of 1939 I was engaged on my *on* behalf in acquiring and developing oil leases in Kern County, California. In connection with such activity it is customary to lease such lands without giving consideration for them, provided the lessee agrees to expend money in drilling operations to prove or disprove the existence of oil or gas.

"While I was so engaged I acquired such a lease on forty acres of land in what is known as The Devils Den area, Kern County, through Mr. Fred V. Gordon. I gave no consideration for this lease to Mr. Gordon or to anyone else. Thereafter, having consulted geologists and having reached the conclusion that the costs of drilling were too great for me, I assigned this lease in blank. The assignment was prepared in the offices occupied by Messrs. Fischgrund and Dunnigan, and after having made the assignment in blank I left the lease with them. I received no consideration whatsoever for having assigned this lease and I do not know what happened to the lease or to whom it was transferred following my assignment. I did not receive as a consideration for this assignment any stock whatsoever of Union Associated Mines company. I do recall that in con-

nection with the assignment I was called upon to sign several papers or documents and, although I do not recall [80] specifically that any of these was a certificate of Union Associated Mines Company stock, it may have been possible that I signed such a certificate by way of endorsement in blank at the suggestion of either Mr. Fischgrund or Mr. Dunnigan or whoever might have been present at that time in their offices. If I did make an assignment of Union Associated Mines Company stock, it was done purely in connection with the transfer of the lease and did not represent stock which I owned or which had been held in my name or from which I derived any benefit whatsoever. If there was anything of this nature it was done strictly by way of accommodation for those interested in the transfer of the lease and in order to clear up the details of the transfer. I was interested only in transferring the lease back to the proper parties because I had no further interest in developing it.

"I have no knowledge at all of any negotiations which preceded my assignment of the lease, other than those which have already been mentioned. I have no knowledge of what was done with the lease after my assignment, other than what has already been mentioned."

The above quotation would appear to refute the statement by the defendant Gordon, made on information and belief, that Millener received 235,000 shares of Union Associated Mines Company stock in consideration for his assignment of the lease in question. No further facts are set forth in Gordon's affidavit which indicate the materiality of Millener's testimony.

(2) The second contention of the defendants that they are prejudiced by a trial at this time is found in the affidavits of the defendant James H. Collins and his present counsel, Mr. Thomas Morris, both verified June 28, 1944. The affidavit of the defendant Collins alleges that he had entrusted certain records and documents in connection with this case to his former attorney, Charles H. Heustis of Los Angeles; that he attempted to communicate with his counsel, Mr. Heustis, in October, 1943; that he was informed that Mr. Heustis was serving in the United States Army and that he immediately forwarded a letter to him at the address furnished by Mrs. Heustis. The affidavit then alleges that the defendant Collins received a reply from Mr. Heustis in March, 1944, to the effect that he would forward to Collins all relevant documents in connection with the case. Collins states that he has not heard from Mr. Heustis since that time.

It should be noted that a copy of the letter received by the defendant Collins from Mr. Heustis in March, 1944, is not attached to the exhibits in support of this motion, although Mr. Morris has attached copies of letters addressed by him to Private Charles H. Heustis and Mrs. Heustis.

The affidavit by the defendant Collins further alleges that he was lulled into a sense of security by a statement made by an Assistant United States Attorney on June 4, 1942, to the effect that his case would be dismissed, and that in reliance upon this statement he neglected to procure certain evidence from his attorney.

In refutation of Collins's claim that he was prejudiced by this statement of the Assistant United States Attorney, entries in the criminal docket of this case disclose

that the case appeared on the calendar of this court on six successive occasions since September 13, 1943, for the purpose of setting a date for trial. It further appears from the court reporter's transcript of the proceedings herein held on October 13, 1943, that Charles H. Heustis appeared as counsel for the defendant Collins. The court reporter's transcript of the proceedings held on February 7, 1944 also discloses that Charles H. Heustis appeared as counsel for the defendant Collins and engaged in a colloquy in the court with reference to fixing a date for trial.

On February 7, 1944, and at later proceedings herein, the defendant Collins advised both Judge Benjamin Harrison and Judge Harry A. [82] Hollzer of this Court of the claim set forth herein; namely, that certain of his papers were unavailable. Notwithstanding such claim, Judges Harrison and Hollzer assigned this case for trial, and gave the defendant Collins ample opportunity to obtain all necessary evidence in his behalf.

The affidavit submitted in support of this motion by Mr. Morris indicates that Mr. Heustis is exercising a lien on certain papers of Collins as security for the payment of his fees. However, Mr. Morris states that the defendant Collins has advised him that he is not indebted to Mr. Heustis.

From the above facts it appears that the defendant Collins had sufficient opportunity, at least since September, 1943, to obtain those documents which he deems necessary to his defense. He cannot at this time seek to profit by his lack of diligence in the preparation of his defense, especially if his alleged predicament was brought about by his failure to discharge an indebtedness to his attorney.

(3) The third contention in support of the relief prayed for herein is found in the affidavit of the defendant Fischgrund. It is charged "that this action has been delayed merely because of the whim and caprice of the attorneys for the Securities and Exchange Commission . . . and that it was their duty to the court and to the defendants to advise the court that no dismissal would be approved or authorized in order not to lull the defendants into a false sense of security."

The defendant Fischgrund, as an attorney at law, should have knowledge that the Securities and Exchange Commission has no power to initiate, maintain or dispose of criminal cases and that neither the Commission nor its attorneys have any jurisdiction to prosecute or dismiss a criminal case. The defendant Fischgrund likewise should have knowledge that neither the Commission nor its attorneys have any authority or jurisdiction to approve, veto or modify the decisions of the Department of Justice in connection with the prosecution or disposition of a criminal case. [83]

Title 15 U. S. C. §77 t. (b), Section 20(b) of the Securities Act of 1933, provides in part as follows:

" . . . The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title"

The trial of this case has not been unduly delayed. The indictment herein was returned on February 4, 1942. The defendants have at all times been on bail or at liberty upon their own recognizance. The defendant Gordon's motion to quash the indictment, or in the alternative to inspect the Grand Jury minutes in furtherance of his

motion to quash, was denied by Judge Harry A. Hollzer on March 16, 1942. The defendant Gordon's petition for a writ of prohibition to the Judges of the Circuit Court of Appeals, 9th Judicial Circuit, directing the United States District Court for the Southern District of California to show cause why it should not be restrained from the trial of this case, or from taking further jurisdiction therein, was denied by the Circuit Court on May 7, 1942.

The affidavits, exhibits and arguments presented by the defendants in support of this motion, fail to indicate wherein these defendants, or any of them, would be prejudiced by proceeding with the trial of this case on the date scheduled therefor.

Deponent avers that on the six occasions since September 13, 1943 that this case appeared on the calendar of this court for setting a trial date, the Government announced its readiness to proceed to trial at a date to suit the convenience of the court and the defendants.

Wherefore, by reason of the facts above stated, and upon all the proceedings heretofore had in this case, the Government respectfully requests that the motion for dismissal of the indictment herein be denied. [84]

SIDNEY MANSTER

Sworn to and subscribed before me this 1st day of July, 1944.

(Seal)

EDMUND L. SMITH,

Clerk U. S. District Court, Southern District of California

By Irwin Hames, Deputy

.....
Notary Public [85]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO MOTION
TO DISMISS

The indictment herein, which charges these defendants with violation of the Securities Act of 1933 in two counts, violation of the mail fraud statute in eight counts, and conspiracy to violate both statutes, was returned by a grand jury in this district on February 4, 1942.

The trial is presently scheduled to commence on July 5, 1944. Since the return of the indictment and to the present time, all defendants have been admitted to bail or at liberty on their own recognizance.

This case has appeared on the trial calendar of this court on six successive occasions since September 13, 1943, for the purpose of setting a trial date. Entries from the criminal docket show that [86] this case appeared on the calendar of this court as follows: September 13, 1943; October 18, 1943; February 7, 1944; March 13, 1944; March 20, 1944; April 3, 1944. At the calendar call of the case on the above dates, the defendants either requested adjournments on the ground that they were not ready to proceed to trial or consented to adjournments by the court for the purpose of fixing a trial date.

Motion papers in support of this application to dismiss the indictment on the ground that the defendants were not accorded a speedy trial in violation of their constitutional rights, were served upon **Government counsel** on June 29, 1944. The motion is set for hearing on July 3, 1944, two days before the trial date. No previous application for the relief herein requested upon these grounds has been made in this case. Under these circumstances, and for the reasons set forth herein and

in the affidavit attached hereto, it is urged that this motion is without merit and should be denied.

In *Daniels, et al. v. U. S.*, 17 F. 2nd 339 (1927—C. C. A. 9th) at page 344, the court stated:

“No statute within the United States defines the time within which criminal accusations must be tried. In the absence of such a statute, it would seem that, if the accused fails in his efforts to bring the case on for trial, his only remedy would be to apply to an appellate court for mandamus. It has been so held. *Frankel v. Woodrough* (C. C. A.), 7 F. 2nd. 796. It is also held that one may not acquiesce in the postponement of his trial from time to time, and then insist on dismissal because he has been denied a speedy trial. *Phillips v. U. S.* (C. C. A.), 201 F. 259; *Worthington v. U. S.* (C. C. A.), 1 F. 2nd. 154, certiorari denied 266 U. S. 626, 45 S. Ct. 125, 69 L. Ed. 475. Here the indictment was returned November 12, 1920, and the [87] trial was had October 6, 1925 . . . It is not shown that at any time between the indictment and the trial, effort was made by the defendant to expedite the case or to bring it on for hearing . . . The motion to dismiss was clearly without merit.” Certiorari was denied: 274 U. S. 744.

In *United States v. Gill*, 55 F. 2nd. 399 (1931), the Court cited the *Daniels*, *Phillips* and *Worthington* cases with approval, and stated:

“The provisions for a speedy trial, ‘in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial’ (Amendment 6), is a personal right which may be waived.”

In *Carter v. Tennessee*, 18 F. 2nd. 850 (1921—C. C. A. 6th) the defendant was indicted at the August term,

1920. He was brought to trial in October, 1923. During this interim he was imprisoned on conviction of another crime. The court cited the Daniels case in overruling the motion to dismiss him because he had not been accorded a speedy trial.

The ruling upon the facts in the Carter case presents an even stronger argument for the denial of the motion herein than the facts of the instant case would warrant. In the Carter case, the defendant was incarcerated and therefore handicapped in efforts to retain counsel and seek the appropriate legal remedy in his behalf. In the instant case, these defendants have at all times been at liberty and represented by counsel, with the exception of the defendant Fischgrund who is an attorney and appears in his own behalf.

Attached and made a part hereof is the affidavit of Sidney Manster, Special Assistant to the United States Attorney.

The motion to dismiss is without merit and should be denied. [88]

Respectfully submitted,

CHARLES H. CARR

United States Attorney

LLEWELLYN J. MOSES

Assistant to the United States Attorney

JAMES M. EVANS

Special Assistant to the United States Attorney

SIDNEY MANSTER

Special Assistant to the United States Attorney

Received copy of the within Affidavit this 3 day of July, 1944. Ben L. Blue, D. H. Cannon, Thos. Morris, Sidney Fischgrund.

[Endorsed]: Filed Sep. 5, 1944. [89]

[Minutes: Wednesday, July 5, 1944]

Present: The Honorable Dave W. Ling, District Judge.

This cause coming on for decision on motion of defendants James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan, Christopher E. Schirm to dismiss; L. J. Moses and J. E. Evans, Assistant U. S. Attorneys, appearing as counsel for the Government; S. Manster, Esq., appearing as counsel for the Securities & Exchange Committee; Thomas Morris, Esq., appearing as counsel for Defendant Collins; Ben L. Blue, Esq., appearing as counsel for Defendants Schirm and Gordon; David H. Cannon, Esq., appearing as counsel for Defendant Morgan; Defendant Fischgrund being present in propria persona; and James J. Marquardt, Court Reporter, being present and reporting the testimony and the proceedings:

The Court states that motion to dismiss is denied and exception is noted for all the defendants.

* * * * * [90]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled cause, find the defendant James H. Collins, Not Guilty as charged in Count 1 of the Indictment; Not Guilty as charged in Count 2 of the Indictment; Not Guilty as charged in

County 4 of the Indictment; Not Guilty as charged in Count 5 of the Indictment; Not Guilty as charged in Count 9 of the Indictment; Not Guilty as charged in Count 10 of the Indictment; and Guilty as charged in Count 11 of the Indictment.

Dated: Los Angeles, California, July 24, 1944.

FRANCIS G. HANSON

Foreman of the Jury

[Endorsed]: Filed Jul. 25, 1944. [91]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled cause, find the defendant Sidney Fischgrund, Not Guilty as charged in Count 1 of the Indictment; Not Guilty as charged in Count 2 of the Indictment; Not Guilty as charged in County 4 of the Indictment; Not Guilty as charged in Count 5 of the Indictment; Not Guilty as charged in Count 9 of the Indictment; Not Guilty as charged in Count 10 of the Indictment; and Guilty as charged in Count 11 of the Indictment.

Dated: Los Angeles, California, July 24, 1944.

FRANCIS G. HANSON

Foreman of the Jury

[Endorsed]: Filed Jul. 25, 1944. [92]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled cause, find the defendant Christopher E. Schirm, Not Guilty as charged in Count 1 of the Indictment; Not Guilty as charged in Count 2 of the Indictment; Not Guilty as charged in County 4 of the Indictment; Not Guilty as charged in Count 5 of the Indictment; Not Guilty as charged in Count 9 of the Indictment; Not Guilty as charged in Count 10 of the Indictment; and Guilty as charged in Count 11 of the Indictment.

Dated: Los Angeles, California, July 24, 1944.

FRANCIS G. HANSON

Foreman of the Jury

[Endorsed]: Filed Jul. 25, 1944. [93]

[Title of District Court and Cause.]

MOTION TO VACATE THE JUDGMENT OF CON- VICTION AND TO DISCHARGE THE DE- FENDANTS NOTWITHSTANDING THE VER- DICT.

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to vacate and set aside the judgment of conviction herein and to discharge the defendants and each of them, notwithstanding the verdict.

That this motion is made upon the records and files herein and upon the transcript of the proceedings on the trial of this action and upon the exhibits offered and received herein, which transcript and exhibits are hereby referred to and relied upon by the said defendants. Said motion is made upon the following grounds and each of them:

1. That the verdicts of the jury finding the said defendants and each of them guilty as charged in the Eleventh Count of the indictment herein, was and is contrary to law and not supported by the law and the facts involved in these proceedings.

DAVID H. CANNON

THOMAS MORRIS

Attorneys for Defendant, John H. Collins

BEN L. BLUE

Attorney for Defendant, Christopher E. Schirm

SIDNEY FISCHGRUND

In Pro. Per.

Received the within Motion to Vacate the Judgment of Conviction and to Discharge the Defts. notwithstanding the Verdict, this 27th day of July, 1944. Charles H. Carr, United States Attorney, by Mary Wentworth.

[Endorsed]: Filed Jul. 27, 1944. [94]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, in the above entitled action, jointly and severally, and move the Court that the verdict in this action against them, and against each of them be set aside, and that they and each of them be granted a new trial, upon the following grounds:

1. That the Court erred in decisions of questions of law arising during the course of the trial.

2. That the verdict is contrary to the law.

3. That the verdict is contrary to the evidence.

4. That the verdict is contrary to the law and the evidence.

5. Because the verdict is against the weight of the evidence.

6. Because the verdict is insufficient to sustain or justify the verdict.

7. Because the facts stated in the indictment against these defendants do not constitute an offense against the United States.

8. Because the Court erred in admitting irrelevant evidence over the objections of the defendants.

9. Because the Court erred in admitting incompetent [95] evidence over the objection of the defendants.

10. Because the Court erred in admitting immaterial evidence over the objections of the defendants.

11. Because the Court erred in sustaining the objections of the Government to competent evidence offered by the defendants.

12. Because the Court erred in sustaining the objections of the Government to relevant evidence offered by the defendants.

13. Because the Court erred in sustaining the objections of the Government to material evidence offered by the defendants.

14. Because the Court erred in admitting, over the objection of the defendants, hearsay evidence.

15. Because the Court erred in admitting, over the objection of the defendants, evidence for the introduction of which no proper or any foundation had been laid.

16. Because of other errors of law occurring at the trial, more fully shown by the transcript herein, which transcript is hereby referred to and relied upon by the defendants herein.

Wherefore, the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm pray that the verdict herein may be set aside and that they and each of them be granted a new trial.

DAVID H. CANNON

THOMAS MORRIS

Attorneys for Defendant, John H. Collins

BEN L. BLUE

Attorney for Defendant, Christopher E. Schirm

SIDNEY FISCHGRUND

In Pro. Per.

Received the within Motion for New Trial this 27th day of July, 1944. Charles H. Carr, United States Attorney, by Mary Wentworth.

[Endorsed]: Filed Jul. 27, 1944. [96]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to refrain from entering a judgment against any of them based upon the verdict rendered in this case, upon the following grounds:

1. That the Eleventh Count in said indictment does not state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or any law or against the Constitution of the United States of America, and particularly said Eleventh Count does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

DAVID H. CANNON

THOMAS MORRIS

Attorneys for Defendant, John H. Collins

BEN L. BLUE

Attorney for Defendant, Christopher E. Schirm

SIDNEY FISCHGRUND

In Pro. Per.

Received the within Motion for Arrest of Judgment this 27th day of July, 1944. Charles H. Carr, United States Attorney, by Mary Wentworth.

[Endorsed]: Filed Jul. 27, 1944. [97]

[Minutes: Tuesday, August 1, 1944]

President: The Honorable David W. Ling, District Judge.

This cause coming on for decision on motions of defendants Collins, Fischgrund and Schirm to vacate judgment, etc., and for arrest of judgment, and for hearing on motion of said defendants for new trial, pursuant to motions filed July 27, 1944; and for sentence of said defendants; James M. Evans, Esq., Special Assistant U. S. Attorney, appearing for the Government; David H. Cannon, Esq., appearing for defendant Collins; Ben Blue, Esq., appearing for defendant Schirm; Sidney Fischgrund appearing in propria persona and also by Ben Blue, Esq., Harry P. Furdson, Court Reporter, being present and reporting the proceedings:

The Court states the record may show that motions for arrest of judgment and to vacate judgment are denied and an exception allowed each defendant.

The Court pronounces judgment against the defendants as follows:

* * * * *

The Court states that the record may show that the motion for new trial is denied and an exception allowed each defendant. [98]

District Court of the United States
Southern District of California
Central Division

No. 15,229

Criminal Indictment in 11 counts for violation of
U. S. C., Title 15, Secs. 77q (a) (1) and
Title 18, Secs. 88, 338

UNITED STATES

v.

JAMES H. COLLINS, et al.

JUDGMENT AND COMMITMENT

On this 1st day of August, 1944, came the United States Attorney, and the defendant James H. Collins appearing in proper person, and by counsel, David H. Cannon, Esq., and

The defendant having been convicted on jury verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit, on Count 11, conspiracy, as more fully set out in the indictment herein, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the imposition of sentence is suspended one year.

DAVE W. LING

United States District Judge

[Endorsed]: Filed this 1st day of August, 1944. [99]

District Court of the United States
Southern District of California
Central Division

No. 15,229

Criminal Indictment in 11 counts for violation of
U. S. C., Title 15, Secs. 77q (a) (1) and
Title 18, Secs. 88, 338

UNITED STATES

v.

JAMES H. COLLINS, et al.

JUDGMENT AND COMMITMENT

On this 1st day of August, 1944, came the United States Attorney, and the defendant Sidney Fischgrund appearing in proper person, and by counsel, Ben Blue, Esq., and,

The defendant having been convicted on jury verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit, on Count 11, conspiracy, as more fully set out in the indictment herein, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the imposition of sentence is suspended one year.

DAVE W. LING

United States District Judge

[Endorsed]: Filed this 1st day of August, 1944. [100]

in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment; that the court erred in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Aug. 5, 1944. [103]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Sidney Fischgrund, 924 Foreman Building, Los Angeles, California.

Name and address of appellant's attorneys—David H. Cannon, 650 South Spring Street, Los Angeles, California, and Ben L. Blue, 620 Bartlett Building, Los Angeles, California.

Offense—Using mails in scheme to defraud (Sec. 338, Title 18, U. S. Code); violation of Securities Act of 1933 (Sec. 17(a)(1), Securities Act of 1933, Sec. 77q(a)(1), Title 15, U. S. C.) and conspiracy (Sec. 88, Title 18, U. S. Code).

Date of judgment—August 1, 1944.

Brief description of judgment or sentence—Entered judgment of conviction on Eleventh Count charging conspiracy, and of acquittal on Counts One to Ten, both inclusive, imposition of sentence suspended one year.

Name of prison where now confined, if not bail—At liberty on own recognizance.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below, and from the motion denying a new trial.

SIDNEY FISCHGRUND

Dated: August 5, 1944. [104]

Grounds of Appeal: That the verdicts acquitting the Appellant of charges embraced in Counts One to Ten, both inclusive, and convicting the Appellant of the charges in Count Eleven were and are inconsistent; that the court erred in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment; that the court erred in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Aug. 5, 1944. [105]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Christopher E. Schirm, c/o Walter Lyon, Pershing Square Building, Los Angeles, Calif.

Name and address of appellant's attorney—Ben L. Blue, 620 Bartlett Building, Los Angeles, California.

Offense—Using mails in scheme to defraud (Sec. 338, Title 18, U. S. Code); violation of Securities Act of 1933 (Sec. 17(a)(1), Securities Act of 1933, Sec. 77q(a)(1), Title 15, U. S. C.) and conspiracy (Sec. 88, Title 18, U. S. Code).

Date of judgment—August 1, 1944.

Brief description of judgment or sentence—Entered judgment of conviction on Eleventh Count charging conspiracy, and of acquittal on Counts One to Ten, both inclusive, imposition of sentence suspended one year.

Name of prison where now confined, if not bail—At liberty on own recognizance.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below, and from the motion denying a new trial.

CHRISTOPHER E. SCHIRM

Dated: August 5, 1944. [106]

Grounds of Appeal: That the verdicts acquitting the Appellant of charges embraced in Counts One to Ten, both inclusive, and convicting the Appellant of the charges in Count Eleven were and are inconsistent; that the court erred

in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment; that the court **erred** in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Aug. 5, 1944. [107]

[Title of District Court and Cause.]

STIPULATION AND ORDER AS TO CAPTIONS AND ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between the parties hereto and their respective attorneys in the aboye entitled cause, that the Clerk of the Court may, in preparing the certified transcript of the record, omit from the caption of all documents, except the indictment filed in said cause, the title of the court and cause, and insert therein the words "Title of Court and Cause."

It Is Further Stipulated that the Clerk of the Court may omit all words and figures upon the back of all documents in the record, except the filing mark thereof.

It Is Further Stipulated that all Exhibits which are omitted and not copied in the proposed Bill of Exceptions, may be copied by the printer from the original Exhibits as filed in this cause, at the respective places so specified for said Exhibits in the Bill of Exceptions.

Dated this 10th day of August, 1944.

DAVID H. CANNON

Attorney for Defendant and Appellant,
James H. Collins

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon
Attorneys for Defendant and Appellant,
Sidney Fischgrund [108]

BEN L. BLUE
Attorney for Defendant and Appellant,
Christopher E. Schirm

CHARLES H. CARR,
U. S. Attorney

LLEWELLYN J. MOSES,
Assistant U. S. Attorney

JAMES M. EVANS,
Special Assistant to U. S. Attorney

S. MANSTER,
Special Assistant to U. S. Attorney

By James M. Evans
Attorneys for Plaintiff and Appellee

It Is So Ordered.

Dated: August 15, 1944.

DAVE W. LING

United States District Judge

Received copy of the within Stipulation this 10th day of August, 1944. James M. Evans, Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Aug. 15, 1944. [109]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE EXHIBITS

It Is Hereby Stipulated by and between the parties hereto and their respective attorneys that all exhibits in the above entitled action which are not copied in the Bill of Exceptions shall, by the Clerk of the District Court, be certified and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated: August 10th, 1944.

DAVID H. CANNON

Attorney for Defendant and Appellant,
James H. Collins

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon
Attorneys for Defendant and Appellant,
Sidney Fischgrund

BEN L. BLUE
Attorney for Defendant Appellant,
Christopher E. Schirm

CHARLES H. CARR,
U. S. Attorney
LLEWELLYN J. MOSES,
Ass't. U. S. Attorney
JAMES M. EVANS,
Special Assistant to U. S. Attorney
S. MANSTER,
Special Assistant to U. S. Attorney

By James M. Evans
Attorneys for Plaintiff and Appellee

It Is So Ordered:

Dated: August 15, 1944.

DAVE W. LING

United States District Judge [110]

Received copy of the within Stipulation this 10th day of August, 1944. James M. Evans, Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Aug. 15, 1944. [111]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME
TO SETTLE BILL OF EXCEPTIONS AND
FILE ASSIGNMENTS OF ERROR

It Is Hereby Stipulated and agreed by and between the above named parties through their respective attorneys, that the time within which the defendants and appellants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, may prepare, serve and settle a proposed Bill of Exceptions herein, and to prepare, serve and file their Assignments of Error, all in connection with the appeal in the above entitled action, may be extended to and including the 5th day of October, 1944.

Dated: August 19, 1944.

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon

Attorneys for Defendants and Appellants

CHARLES H. CARR,
U. S. Attorney

LLEWELLYN J. MOSES,
Ass't. U. S. Attorney

JAMES M. EVANS,
Special Assistant to U. S. Attorney
S. MANSTER,
Special Assistant to U. S. Attorney
By James M. Evans
Attorneys for Plaintiff and Appellee.

It Is So Ordered: This 22 day of August, 1944.

DAVE W. LING

United States District Judge

[Endorsed]: Filed Aug. 22, 1944. [112]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME
TO SETTLE BILL OF EXCEPTIONS AND
FILE ASSIGNMENTS OF ERROR

It Is Hereby Stipulated and agreed by and between the above named parties through their respective attorneys, that the time within which the defendants and appellants, James H. Collins, Sidney Fischgrund and Christopher E. Schirm, may prepare, serve and settle a proposed Bill of Exceptions herein, and within which to prepare, serve and file their Assignments of Error, all in connection with the appeal in the above entitled action, may be extended to and including the 20th day of October, 1944.

Dated: September 20, 1944.

DAVID H. CANNON and
BEN L. BLUE

By Ben L. Blue

Attorneys for Defendants and Appellants

CHARLES H. CARR

U. S. Attorney

LLEWELLYN J. MOSES

Ass't. U. S. Attorney

JAMES M. EVANS

Special Ass't. to U. S. Attorney

S. MANSTER

Special Ass't. to U. S. Attorney

By James M. Evans

Attorneys for Plaintiff and Appellee

It Is So Ordered: This 22nd day of September, 1944.

ALBERT LEE STEPHENS

United States Circuit Judge

FRANCIS A. GARRECHT

U. S. Circuit Judge

[Title of District Court and Cause.]

AFFIDAVIT OF BEN BLUE IN SUPPORT

State of California

County of Los Angeles—ss.:

Ben L. Blue, being first duly sworn, deposes and says:

That affiant is one of the attorneys of record for the appellants herein; that David H. Cannon is associated with him as attorney of record;

That heretofore and to wit, on September 12, 1944, a stipulation was entered into by and between them and Charles H. Carr, United States District Attorney, wherein and whereby it was stipulated that the appellants here-

in would have to and including October 20, 1944, within which to prepare, serve and file a proposed bill of exceptions and their assignments of error; that said stipulation was forwarded to Honorable Dave Ling, United States District Judge, who presided at the trial of the case, but who at the present time is in Phoenix, Arizona, as more fully appears by the letter attached hereto, marked Exhibit "A", and by reference made a part hereof;

That by reason of the fact that the stipulation was forwarded to Judge Ling by mail, the order granting the extension of time was not signed by Judge Ling until after the original 30 days expired. That the bill of exceptions in the above entitled case has been entirely prepared and covers 262 typewritten pages, and the transcript in the trial of the cause consumed approximately 1500 pages.

That the attorneys for the appellants have worked diligently to prepare the bill of exceptions and the assignments of error within the time specified by the rules of the court, and did prepare the order for the extension of time properly and timely, but by reason of Judge Ling's absence from the city it was not possible to have it signed within the 30 days.

That in the interests of justice, the appellants should have to and including the 20th day of October, 1944, within which to file their proposed bill of exceptions and their assignments of error.

David H. Cannon, who had prepared and forwarded the stipulations and the order is at the present time out of the city and will not return for at least ten days. Mr. Cannon left Los Angeles approximately a week ago on legal business in Toronto, Canada, and Washington, D. C.

BEN L. BLUE

Subscribed and sworn to before me this 20th day of September, 1944.

(Seal)

ZOA L. ZACCHE

Notary Public in and for the County of Los Angeles,
State of California

EXHIBIT "A"

September 12, 1944

Honorable Dave Ling
U. S. District Judge
Phoenix, Arizona

In re: U. S. vs. Collins et al
Southern California No. 15229

My dear Judge:

None of us expect that we will need all of the time asked for under the attached stipulation. However, out of an abundance of caution, and because I am leaving the city today to be gone for several weeks, we all thought it advisable to get this extension of time.

When and if you make the order, will you please mail it to the Clerk in Los Angeles for filing.

Kind regards.

Sincerely yours,

David H. Cannon

of CANNON & CALLISTER

WB

Encl.

cc Mr. Blue

Mr. Fischgrund

Received copy of the within Stipulation this 20th day of Sept., 1944. James M. Evans, Attorney for Appellee.

[Endorsed]: Filed Sep. 25, 1944. Paul P. O'Brien,
Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 115 inclusive contain full, true and correct copies of Indictment; Motion of Fred V. Gordon to Quash Indictment; Motion of Sidney Fischgrund to Quash Indictment; Minute Orders Entered March 2, 1942 and March 16, 1942; Motion to Dismiss; Affidavit of Sidney Manster in Opposition to Motion to Dismiss; Minute Order Entered July 5, 1944; Three Verdicts of the Jury; Motion to Vacate the Judgment of Conviction and to Discharge the Defendants Notwithstanding the Verdict; Motion for New Trial; Motion for Arrest of Judgment; Minute Order Entered August 1, 1944; Three Judgments and Commitments; Three Notices of Appeal; Stipulation and Order re Captions, etc.; Stipulation and Order re Exhibits; Stipulation and Order Extending Time to Settle Bill of Exceptions, etc.; Praecipe and Supplemental Praecipe which, together with Original Bill of Exceptions, Original Assignment of Errors and Original Exhibit transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$40.75 which sum has been paid to me by Appellants.

Witness my hand and the seal of said District Court this 14 day of November, 1944.

[Seal]

EDMUND L. SMITH, Clerk
By Theodore Hocke
Chief Deputy Clerk.

[Endorsed]: No. 10846. United States Circuit Court of Appeals for the Ninth Circuit. James H. Collins, Sidney Fischgrund and Christopher E. Schirm, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 16, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10846—Criminal

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

JAMES H. COLLINS, et al.,

Defendants and Appellants.

AFFIDAVIT

State of California

County of Los Angeles—ss:

David H. Cannon, being duly sworn, deposes and says:

That he is one of the attorneys for the above-named appellants; that a stipulation is now on file between the attorneys for the above-named parties under which it is agreed that the appellants herein may, with the consent of the Court, have to and including November 10, 1944 within which to prepare, serve and file a proposed Bill

of Exceptions herein, and within which to prepare, serve and file their Assignments of Error herein.

DAVID H. CANNON

Subscribed and sworn to before me this 20th day of October, 1944.

(Seal)

REED E. CALLISTER

Notary Public in and for the County of Los Angeles,
States of California.

It Is So Ordered That Such Extension of Time Be
Granted.

Dated: October 20th, 1944.

WILLIAM DENMAN

ALBERT LEE STEPHENS

United States Circuit Judges.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT

Re: Extension of Time to File Bill of Exceptions and
Assignment of Errors to November 10, 1944

State of California

County of Los Angeles—ss:

David H. Cannon, being duly sworn, deposes and says:

That he is one of the attorneys for the above-named appellants; that such extension is necessary because affiant, who has been in charge of preparation of this Bill of Exceptions for the appellants, has necessarily been absent from California on war business for four weeks and has just returned to California, and for that reason it was impossible to complete the proposed amendments to the Bill of Exceptions at an earlier date and it was

desired by all parties, including the Trial Judge, to have a stipulation made between the parties that the Bill of Exceptions contained all of the evidence before the Trial Court.

DAVID H. CANNON

Subscribed in my presence and sworn to before me this 21st day of October, 1944.

(Seal)

EARLE E. SWEM

Notary Public

[Endorsed]: Filed Oct. 21, 1944. Paul P. O'Brien, Clerk.

[Minutes: Tuesday, April 3, 1945]

Present: The Honorable Paul J. McCormick, District Judge.

This cause coming on for further proceedings as to defendants James H. Collins, Sidney Fischgrund and Christopher E. Schirm; A. DiGirolamo, Esq., Assistant U. S. Attorney, appearing for the Government; Ben Blue, Esq., appearing for defendants Fischgrund and Schirm; David H. Cannon, Esq., appearing for defendant Collins; H. A. Dewing, Court Reporter, being present and reporting the proceedings; the said defendants being present in court:

Attorney Cannon makes a statement and waives any jurisdictional feature. Attorney DiGirolamo makes a statement that Mandate of the Circuit Court of Appeals has not been filed. It is ordered that this cause be, and it hereby is, continued to April 9, 1945, at 2 P. M. for further proceedings. [2]

[Minutes: Monday, April 9, 1945]

Present: The Honorable Paul J. McCormick, District Judge.

This cause coming on for further proceedings as to defendants James H. Collins, Sidney Fischgrund, and Christopher E. Schirm; A. DiGirolamo, Esq., Asst. U. S. Attorney, appearing for the Government; Ben Blue, Esq., appearing for defendants Fischgrund and Schirm; David H. Cannon, Esq., appearing for defendant Collins; Hollis O. Black, Esq., appearing for the Securities & Exchange Commission; James J. Marquardt, Court Reporter, being present and reporting the proceedings; the said defendants being present:

Attorney DiGirolamo makes a statement. Attorney Blue makes a statement in behalf of the defendants. Attorney Cannon makes a statement. Attorney Black makes a statement. The Court pronounces judgment against each of the defendants as follows:

* * * * *

It is further ordered that each of said defendants remain on his own recognizance pending appeal. [3]

District Court of the United States
Southern District of California
Central Division

No. 15229

Criminal Indictment in 11 counts for violation of
U. S. C., Title 15 and 18,
Secs. 77q(a)(1); 88, 338.

UNITED STATES

v.

JAMES H. COLLINS

JUDGMENT AND COMMITMENT

On this 9th day of April, 1945, came the United States Attorney, and the defendant James H. Collins appearing in proper person and by Counsel, David H. Cannon, Esq., and, the defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: count 11, conspiracy to commit certain offenses against the United States, to-wit: to wilfully violate Section 17(a)(1) of the Securities Act of 1933, and Section 215 of the Criminal Code of the United States, as charged and set forth in said 11th count of the Indictment, in violation of Title 18, United States Code, Section 88, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1)

year in a Federal Jail, said term of imprisonment to be suspended for a period of Two (2) years, and said defendant is placed on probation for said period of time under the supervision of the Probation Officer of this Court, to whom said defendant shall report at such times as shall be required, and observe the usual rules and conditions of probation as said Probation Officer shall prescribe.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Apr. 9, 1945. [4]

District Court of the United States

Southern District of California

Central Division

No. 15229

Criminal Indictment in 11 counts for violation of

U. S. C., Title 15 and 18,

Secs. 77q(a)(1); 88, 338.

UNITED STATES

v.

SIDNEY FISCHGRUND

JUDGMENT AND COMMITMENT

On this 9th day of April, 1945, came the United States Attorney, and the defendant Sidney Fischgrund appearing in proper person, and by counsel, Ben Blue, Esq.,

and, the defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: count 11, conspiracy to commit certain offenses against the United States, to-wit: to wilfully violate Section 17(a)(1) of the Securities Act of 1933, and Section 215 of the Criminal Code of the United States, as charged and set forth in said 11th count of the Indictment, in violation of Title 18, United States Code, Section 88, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) year in a Federal Jail, said term of imprisonment to be suspended for a period of Two (2) years, and said defendant is placed on probation for said period of time under the supervision of the Probation Officer of this Court, to whom said defendant shall report at such times as shall be required, and observe the usual rules and conditions of probation as said Probation Officer shall prescribe.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Apr. 9, 1945. [5]

District Court of the United States
Southern District of California
Central Division
No. 15229

Criminal Indictment in 11 counts for violation of
U. S. C., Title 15 and 18,
Secs. 77q(a)(1); 88, 338.

UNITED STATES

v.

CHRISTOPHER E. SCHIRM

JUDGMENT AND COMMITMENT

On this 9th day of April, 1945, came the United States Attorney, and the defendant Christopher E. Schirm appearing in proper person, and by counsel, Ben Blue, Esq., and, the defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: count 11, conspiracy to commit certain offenses against the United States, to-wit: to wilfully violate Section 17(a)(1) of the Securities Act of 1933, and Section 215 of the Criminal Code of the United States, as charged and set forth in said 11th count of the Indictment, in violation of Title 18, United States Code, Section 88, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) year in a Federal Jail, said term of imprisonment to be suspended for a period of Two (2) years, and said

defendant is placed on probation for said period of time under the supervision of the Probation Officer of this Court, to whom said defendant shall report at such times as shall be required, and observe the usual rules and conditions of probation as said Probation Officer shall prescribe.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Apr. 9, 1945. [6]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—James H. Collins, 1236 South Holt Street, Los Angeles, California.

Name and address of appellant's attorney, David H. Cannon, 650 South Spring Street, Los Angeles 14, California.

Offense—Using mails in scheme to defraud (Sec. 338, Title 18, U. S. Code); violation of Securities Act of 1933 (Sec. 17(a)(1), Securities Act of 1933, Sec. 77q(a)(1), Title 15, U. S. C. and conspiracy (Sec. 88, Title 18, U. S. Code).

Date of judgment—April 9, 1945.

Brief description of judgment or sentence—One year in a Federal jail, said term of imprisonment to be suspended for two years and said defendant is placed on probation for said period of time under the supervision of the probation officer of this court.

Name of prison where now confined, if not bail—At liberty on own recognizance.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth

Circuit from the Judgment above-mentioned on the grounds set forth below.

JAMES H. COLLINS

Dated: April 9, 1945. [7]

Grounds of Appeal: That the verdicts acquitting the Appellant of charges embraced in Counts One to Ten, both inclusive, and convicting the Appellant of the charges in Count Eleven were and are inconsistent; that the court erred in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment; that the court erred in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Apr. 14, 1945. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Sidney Fischgrund, 924 Foreman Building, Los Angeles, California.

Name and address of appellant's attorneys, David H. Cannon, 650 South Spring Street, Los Angeles 14, California, and Ben L. Blue, 620 Bartlett Building, Los Angeles 14, California.

Offense—Using mails in scheme to defraud (Sec. 338, Title 18, U. S. Code); violation of Securities Act of 1933

(Sec. 17(a)(1), Securities Act of 1933, Sec. 77q(a)(1), Title 15, U. S. C.) and conspiracy (Sec. 88, Title 18, U. S. Code).

Date of judgment—April 9, 1945.

Brief description of judgment or sentence—One year in a Federal jail, said term of imprisonment to be suspended for two years and said defendant is placed on probation for said period of time under the supervision of the probation officer of this court.

Name of prison where now confined, if not bail—At liberty on own recognizance.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below.

SIDNEY FISCHGRUND

Dated: April 10, 1945. [9]

Grounds of Appeal: That the verdicts acquitting the Appellant of charges embraced in Counts One to Ten, both inclusive, and convicting the Appellant of the charges in Count Eleven were and are inconsistent; that the court erred in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment; that the court erred in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Apr. 13, 1945. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Christopher E. Schirm, c/o Walter Lyon, Pershing Square Building, Los Angeles, Calif.

Name and address of appellant's attorney—Ben L. Blue, 620 Bartlett Building, Los Angeles, California.

Offense—Using mails in scheme to defraud (Sec. 338, Title 18, U. S. Code); violation of Securities Act of 1933 (Sec. 17(a)(1), Securities Act of 1933, Sec. 77q(a)(1), Title 15, U. S. C.) and conspiracy (Sec. 88, Title 18, U. S. Code).

Date of judgment—April 9, 1945.

Brief description of judgment or sentence—One year in a Federal jail, said term of imprisonment to be suspended for two years and said defendant is placed on probation for said period of time under the supervision of the probation officer of this court.

Name of prison where now confined, if not bail—At liberty on own recognizance.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below.

CHRISTOPHER E. SCHIRM

Dated: April 10, 1945. [11]

Grounds of Appeal: That the verdicts acquitting the Appellant of charges embraced in Counts One to Ten, both inclusive, and convicting the Appellant of the charges in Count Eleven were and are inconsistent; that

the court erred in refusing to instruct the jury to return verdicts acquitting the Appellant on each and all of the counts in the indictment; that the court erred in refusing to grant Appellant's motion for arrest of judgment that the court erred in not furnishing the trial jury with a copy of the court's charge to the jury, or permitting such charge to be re-read to the jury, when so requested by the jury; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding Appellant guilty.

[Endorsed]: Filed Apr. 13, 1945. [12]

[Title of District Court and Cause.]

ORDER

Upon reading and filing the Stipulation herein, dated May 7, 1945, and good cause appearing,

It Is Ordered, that the Assignments of Errors, Bill of Exceptions, and Clerk's Transcript heretofore certified by the clerk of the above entitled court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the latter court's No. 10846, may be adopted by reference as Assignments of Errors, Bill of Exceptions and Clerk's Transcript in connection with the notices of appeal filed with this court by said appellants on April 13 and 14, 1945.

Dated: May 8th, 1945.

PAUL J. McCORMICK

Judge, United States District Court [13]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by the parties hereto that the Assignments of Errors and Bill of Exceptions heretofore filed, and Clerk's Transcript, all of which heretofore have been certified by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under such court's No. 10846, may be adopted by reference as Assignments of Errors, Bill of Exceptions and Clerk's Transcript in connection with the notices of appeal filed with this court by the said appellants on April 13 and 14, 1945, and which said appeal is now docketed in the United States Circuit Court of Appeals for the Ninth Circuit under its No. 11037.

It Is Further Stipulated That Honorable Paul M. McCormick, United States District Judge for the Southern District of California, may make an order under this stipulation in the [14] form herewith submitted, and which form bears the written endorsement of the attorneys for the parties hereto.

Dated: May 7, 1945.

DAVID H. CANNON

Attorney for James H. Collins

BEN L. BLUE

DAVID H. CANNON

Attorneys for Sidney Fischgrund

BEN L. BLUE

Attorney for Christopher E. Schirm

CHARLES H. CARR,

United States Attorney

By Charles H. Carr

U. S. Attorney

[Endorsed]: Filed May 8, 1945. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 16 inclusive contain full, true and correct copies of Minute Orders Entered April 3, 1945 and April 9, 1945 respectively; Judgment and Commitment as to each of the defendants James H. Collins, Sidney Fischgrund and Christopher E. Schirm; Notice of Appeal as to each of defendants James H. Collins, Sidney Fischgrund and Christopher E. Schirm; Stipulation and Order re Adoption of Assignment of Errors, Bill of Exceptions and Clerk's Transcript and Second Supplemental Praecept which, together with Clerk's Transcript, Bill of Exceptions, Assignment of Errors and Exhibits heretofore transmitted in connection with case No. 10846 in the United States Circuit Court of Appeals for the Ninth Circuit constitute the record on appeal to the United States Circuit Court of Appeals.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$5.50 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 10 day of May, 1945.

[Seal;

EDMUND L. SMITH, Clerk

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that this cause came on regularly for trial on the 5th day of July, 1944, before the Hon. Dave W. Ling, Judge of said Court, and a jury therein being duly impaneled and sworn to try said cause, L. J. Moses, Esq., Assistant United States Attorney, and James M. Evans, Esq. and S. Manster, Esq., Special Assistants to the United States Attorney, appearing as attorneys for the plaintiff; and Thomas Morris, Esq., appearing as attorney for the defendant James H. Collins; Ben L. Blue, Esq., appearing as attorney for defendants Fred V. Gordon and Christopher E. Schirm; David H. Cannon, Esq., appearing for defendant John H. Morgan, and Sidney Fischgrund, defendant appearing in *Propria Persona*.

Whereupon, the trial of said cause proceeded and the following proceedings were had, and testimony, oral and documentary, was offered by the respective parties, and admitted by the court.

Mr. Cannon: Your Honor, for the sake of the record, may we have it understood that any objections made by any one of the defendants may be deemed to have been made on behalf of all the defendants unless the particular defendant who doesn't want to avail himself of it disclaims it?

The Court: Yes.

Mr. Cannon: And that any exception taken by any one of counsel will be deemed to have been taken by each of the defendants?

The Court: Yes. (Tr. 59)

ZELL TRUMAN,

a witness called on behalf of the Government, having been [2*] first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Zell Truman.

Mr. Cannon: If the Court please, counsel has handed me a certified copy of Articles of Incorporation of the Union Associated Mines Company, a Utah corporation, together with the amendments thereto, and the defense stipulates that the matter may go into evidence without further identification. (Tr. 61)

(Government Exhibit No. 1 in evidence.)

(Witness continuing)

I reside in Salt Lake City, Utah, and am an employing printer, owning a small printing business, and am a director of Union Associated Mines Company, and am Assistant Secretary. I have been a director since some time in 1935, and at one time served as Secretary of the company. I became the Secretary in 1934 or 1935, and acted as Secretary until some time in 1938, but at present I am the Assistant Secretary. While I was Secretary of the Company I had custody of the minute book and again recently I had it. (Tr. 25)

I know the defendant John Morgan and have known him since the Plymouth Oil deal came up.

Q. I will ask you whether or not at any time in 1938 you discussed with the defendant John Morgan a proposal whereby the Plymouth Oil Company agreed to convey a

*Page numbering appearing at foot of page of original Bill of Exceptions.

(Testimony of Zell Truman)

50 per cent interest in a well or wells to be drilled to the Union Associated Mines Company in exchange for stock of Union Associated Mines Company?

Mr. Blue: If the Court please, on behalf of the defendants Gordon, Schirm, Fischgrund and Collins I will object on the ground that it calls for hearsay and that no proper foundation has been laid. [3]

The Court: The witness may answer.

Mr. Blue: Exception. (Tr. 66-67)

* * * * *

Mr. Blue: I further wish to object, without the necessity of my arising each time, I would like my objection to be noted to any of these conversations outside the presence of the defendants whom I named, Gordon, Schirm, Collins and Fischgrund on the ground that it calls for hearsay, and no proper foundation has been laid.

The Court: The objection is overruled. (Tr. 67)

(Witness continuing)

The first discussions were held in the Utah Oil Building in Mr. Morgan's law office. The discussions were with a number of people. I did not talk with Mr. Morgan individually. There was a group. I was called on the telephone to come down to the Utah Oil Building, and went there and met two men from California—Mr. Siens and another man whose name I am not sure of. They made a general proposition—Mr. Morgan was there—and Mr. Weeks, who was President of the company. A proposition was made that these men had valuable oil land in California and they would exchange a 50 per cent interest in an oil well which they would guarantee to drill and bring into production for about 600,000 shares of

(Testimony of Zell Truman)

Union Associated Mining Company treasury stock. This proposition was presented by these two men from California, one of whom was Mr. Siens. (Tr. 70) We, the Union Associated Mines Company, accepted the proposition by ratification by the Board of Directors, and thereafter a contract was executed between the parties.

I am only very slightly acquainted with Mr. [4] Gordon. Mr. Gordon was in one of these meetings but whether it was the first one or not I would not say. I remember the name, and when I saw Mr. Gordon in the court room I recognized him, but I would not have recognized him had I met him casually.

Q. You say you met him once or twice at one of the meetings? One of the meetings where and what?

A. Well, as best I remember, there were two or more meetings between the Union Associated and different members of the Plymouth Oil.

Q. Where were those meetings held?

A. I think they were all held at Mr. Morgan's office.

Q. In Salt Lake City? A. In Salt Lake City.

Q. And approximately when were they held, about what time?

A. It would be in the summer of 1938. The minute book will show.

Q. And did you have any discussion with Mr. Gordon about the proposal to transfer interest from Plymouth Oil Company for Union Associated stock?

A. There was general discussion, yes.

Q. Did you have any particular discussion with Mr. Gordon?

A. Well, I cannot remember whether it was Mr. Gordon or some of the others. There were either two or more of these men in the discussions.

(Testimony of Zell Truman)

Q. I will ask you whether or not you have ever met the defendant James H. Collins?

A. I think I have but I don't place him.

Q. Do you recognize the gentleman seated back here?

A. No, I would not identify him. (Tr 71-72) [5]
(Witness continuing)

I think I followed Reva Perry Olsen as assistant secretary of Union Associated Mines Company. Mr. Morgan succeeded me as secretary of that company. In my business as a printer in Salt Lake City I did printing work for the Union Associated Mines and for Mr. Morgan. I printed some stock certificates of the Union Associated Mines Company and also some letters on behalf of that company. I printed about five hundred each of the letters which have been marked as Plaintiff's Exhibits 2, 3, 4 and 5 for identification, as I now remember, because that is the usual number. The orders came in mostly from Mr. Morgan, although I believe that first letter dated September 29, 1938, was kind of a joint affair. It is over my signature. (Tr. 73) I think Morgan and I talked it over together. Morgan placed the orders for exhibits 3, 4 and 5 identification. Exhibit 2, dated September 29, 1938, was printed at or about that date, and the other exhibits 3, 4 and 5 were printed on or about the dates they bear. I received the information that went into these letters mostly from Mr. Morgan, but I think I wrote the copy on the first letter, Exhibit No. 2. (Tr. 74) Soon after the deal was made with the Plymouth, in 1938 or '39, I printed stock certificates for the Union Associated Mines Company. You have my records, and I could tell exactly by looking at those

(Testimony of Zell Truman)

records. (Tr. 75) After Exhibits 2, 3, 4 and 5 for identification were printed, I delivered the printed copies to Mr. Morgan's office. I printed 1000 blank stock certificates for Union Associated Mines Company in January, 1939, and mailed part of them to Mr. Siens in Los Angeles. I became a Director and Secretary of the Union Associated in 1935 in February. Morgan became an Officer or a Director of that company in September, 1938, but to my knowledge he [6] had not been an Officer or Director of that Company previously.

(It was stipulated that the Union Associated Mines Company was suspended for non-payment of franchise fees and tax in the State of Utah.) (Tr. 81)

(Witness continuing)

This suspension of the Union Associated was prior to September, 1938, and the corporate privileges of that company were restored after September, 1938. S. A. Perry was President of Union Associated Mines Company when it was incorporated and continued as President until he died in July, 1935. Just prior to September, 1938, and for some time previous, the company was not conducting any active business; but it was incorporated to engage in a mining business and it was so engaged in 1936, when I conducted a limited amount of development or prospecting when I worked on a placer mining machine, and in about three days' work we sold the gold for \$7.00, which was the last actual sale. (Tr. 87) That was some time in 1936. Up to September 1, 1938, the Union Associated Mines Company had never paid dividends on its stock.

(Testimony of Zell Truman)

Q. By Mr. Evans: I will ask you whether or not up to September 1, 1938, any assessments had been levied upon the stock of Union Associated Mines Company?

Mr. Cannon: I object to that, if the Court please, to this line of interrogation, and without my restating it each time may it be understood that I object to this line of interrogation, to each question thereof, and take an exception to your Honor's ruling in the event your Honor overrules the objection, on the ground it is hearsay to each and all of these defendants, it is outside the realm of the pleadings of the indictment. [7]

The Court: All right, go ahead. Objection overruled.

Mr. Cannon: May I have that understanding?

The Court: Yes. (Tr. 87-88)

(Witness continuing)

There was a total of eight assessments levied upon the stock of that Company, between the date it started about 1931 or 1932 and 1935. When the Plymouth-Union deal was proposed, Mr. Gordon was present at some of those discussions and I had a personal discussion with him, at least one, but perhaps twice; it was either on the first or second meeting, and would be prior to or about September 8, 1938. The discussions were in Mr. Morgan's office and I am quite sure that Mr. Siens was present, on either one or two occasions. At the first meeting, I cannot say who was present, but I asked the representatives what they were going to do with the stock of the Union Associated Mines Company which they acquired, and at that time they said they would sell the stock to raise the money to drill the well. I asked them if they sold the stock what they would get out of it, and they said they would have a

(Testimony of Zell Truman)

half interest in the producing well and that they might be able to raise the money and do the drilling themselves, and in that case they would have the 635,000 shares of Union Associated stock as their profit. (Tr. 91) By "they" I meant the Plymouth, the outfit that was making the proposition. Something was said by Mr. Gordon or Mr. Siens to me about selling their stock, the first idea being that they would sell the stock to raise the money to drill the well. Then, as they would raise the money outside the sale of the stock, there was nothing definitely said what they would do with the stock, whether it was to be sold or held. (Tr. 92) There was nothing said about what the value of the stock might be, but [8] the idea was that the stock would increase in value. Something was said by Mr. Gordon or Mr. Siens that they had connections with brokerage firms and were positive that they could place the stock to good advantage to raise sufficient money to do the drilling.

(At this point a stipulation was made that certain photostat copies of certain pages of the minute book of Union Associated Mines Company might be offered and received in evidence, and they were offered and received in evidence without further foundation, as Government Exhibit No. 6, with the following reservation:)

Mr. Blue: If the Court please, I have no objection so far as the foundation is concerned except that on behalf of the other defendants I object to the minutes as set forth on the ground it is hearsay as to them, and there is no foundation as yet laid as to in any way connect any of the defendants with the preparation of these minutes, and I therefore urge that objection to them.

(Testimony of Zell Truman)

Mr. Evans: Do I understand you correctly, Mr. Blue, that you are stipulating on behalf of all the other defendants that the—

Mr. Blue: They are the minutes. There is no question about that.

Mr. Evans: —Union Associated Mines Company and may be introduced subject to your objection as to their competency and relevancy and materiality?

Mr. Blue: And it is definitely hearsay as far as the other defendants (except Morgan) are concerned.

The Court: All right. They may be received.

Mr. Blue: Exception. (Tr. 94-95) [9]

Cross-Examination

By Mr. Cannon:

I first became acquainted with Mr. Morgan in 1938, but since then I have known him very well indeed. They call him "Judge" or "Jack". I became associated with Union Associated Mines Company in 1935, and remained a Director ever since that time. I was first secretary and then became assistant secretary to Mr. Morgan, and during the whole of the time which Morgan was secretary I was acting as assistant secretary. Later Mr. Morgan resigned as secretary, but I do not think he resigned as a Director. After he resigned as secretary I became secretary. (Tr. 98) During the time that I have been a Director of this Company I have done my very best with it and I have never consented to the doing of anything that I thought was dishonest. Neither has Mr. Morgan done anything that was dishonest, so far as I know. His reputation in Salt Lake City is good, as far as I know, and the people with whom I have been most closely

(Testimony of Zell Truman)

associated with Mr. Morgan regard him as a man of good reputation. I was the author of Government Exhibit No. 2 with Mr. Morgan's consent, and he and I discussed and I made suggestions with respect to exhibits 3, 4 and 5 for identification. For printing of these Exhibits 2, 3, 4 and 5 for identification, I charged a normal price that I would usually charge for such a job. And I was paid for it. I absolutely did not knowingly make any misrepresentation or false statements in any of the letters that I prepared, or in which I assisted in the preparation.

Cross-Examination

By Mr. Blue:

My memory is not quite as good as it was some time ago. During my tenure of office as either a director or assistant secretary or secretary of Union Associated Mines, I [10] have never taken any direction from Gordon, Fischgrund, or Davis, and I have not contacted them in any way. I think I have never met Mr. Schirm. I met Mr. Siens about three different times. I met him more than any other man in the deal. (Tr. 102) After September, 1938, we had a directors' meeting, when the old directors resigned and new ones were elected, but who was present at that time I would not say. But after the first meeting I do not believe that anyone was at our meetings representing the Plymouth Oil Company. At one time, I realized that the Plymouth Oil Company owned the control of Union Associated Mines Company, but I was not exactly worried but wondered how it would work out. At one time, I remember Siens called while there were three of us directors present, Mr. Weeks was there and I was, and one other, but I am satisfied that Mr.

(Testimony of Zell Truman)

Morgan was not there, although it was held in his office. Siens told us that we need not be worried about the Plymouth controlling the Union Associated. He said that at one time he had taken a company similar to Union, built it up, and then had been cheated out of it, and that he was now going to make a real company with value, and he wanted a board of directors on the Union Associated that were just plain business men; they did not have to be oil men because we could get oil experts to give us all the advice and assistance we needed, but that he wanted plain business men that would stand behind him and would not sell him out. (Tr. 104) There has at no time been any direction from the Plymouth Oil Company as to our procedure. There has only been very, very little money derived from our operations or from our ownerships in property. The amount of money Union Associated Mines Company got from its interest in the 50 per cent ownership in Plymouth Oil Well No. 1 from December, 1938, and thereafter until December, 1939, shows on [11] the record, but I know it is correct that Union Associated Mines Company received more from its operation and ownership of Plymouth Oil Well No. 1 than it received in all the years that it had owned mining property prior to that time. I cannot say whether or not I have ever met Mr. Collins; I think I have but I don't remember the man. (Tr. 107)

Re-Direct Examination

By Mr. Evans:

My signature appears on page numbered 21 of Exhibit 7 for identification, which is a copy of the registration statement filed with the Securities and Exchange Commission. (Tr. 107) It was prepared by Mr. Perry, the

(Testimony of Zell Truman)

auditor at that time, and I signed it as assistant secretary; but I did not compile any of the information, nor collect any of the information set out in Exhibit 7 for identification. I took Mr. Perry's word for it that the matter contained in Exhibit 7 for identification was correct. I must have signed this document about January 16, 1939. Prior to September 1, 1938, the stock of Union Associated Mines Company was listed on the Salt Lake City Stock Exchange; that was before Mr. Perry died in 1935; that listing continued for a year or so after Mr. Perry died, and I was unable to furnish the proper statements concerning the business without employing an auditor. At that time the auditor would have cost us \$100.00 or more, and I did not have \$100.00 so it sort of went by default and it was taken off the board. That was in 1936, or possibly 1937. (Tr. 111) There was one dividend only paid by the company and that was paid after the money was derived from the Torrance Oil Field well, and it was paid on August 30, 1939, and amounted to \$1.00 per 1,000 shares. I was present at the directors' meeting of Union Associated when it was resolved to declare that dividend. (Tr. 111) The board of directors' meeting on [12] August 11, 1939, appearing on page 148 of Exhibit 6, authorized that dividend. I discussed the matter with Mr. Morgan and told him I did not think it was good business to pay the dividend, and I told him we should use that money in developing the business. Mr. Morgan said that it was the idea that the brokers had conveyed in putting out the stock that it would pay dividends, and it was necessary to pay a dividend in order

(Testimony of Zell Truman)

to clear the records. (Tr. 113) From the time Mr. Morgan became secretary, I received my orders from Mr. Morgan who as far as I know directed the policy of Union Associated.

Recross-Examination

By Mr. Cannon:

After Mr. Morgan became secretary, John Clayton was president; William Weeks, I think, vice-president, and Morgan was secretary-treasurer, and I assistant secretary. Mr. Brown was a director and Mr. Burch. Brown is an engineer for the Highland Boy Smelter in Murray, and I accepted him as a good, practical business man. I do not know Burch very well, but I understood he was pretty well off financially and he may have been a wealthy cattle man of Utah. (Tr. 114) I thought the other men who were directors were solid, substantial business men. Morgan and I had differences of views with respect to the propriety of paying the dividend. Personally, I did not think it was good business to pay it, although I knew the company had a surplus with which to pay it, and the matter was formally considered by the board of directors, and I exercised my best judgment and voted for it. As far as I know, the other directors used their best judgment. The Union Associated was listed on the Salt Lake Stock Exchange. I do not know how high it sold on the Exchange, but I got a letter from one stockholder while I was an executive saying that he [13] had paid as high as 40 cents a share for it. I know it sold on the Salt Lake Exchange as high as 25 cents a share for a considerable period; at least I would think so, although I did not follow it. When the Union Associated Mines Company stock

(Testimony of Zell Truman)

was selling on the Salt Lake Stock Exchange at upwards of 20 cents a share they still had only the mining properties which they had at the time of the Plymouth deal; and when the Plymouth Oil Company deal was made the Union Associated Mines Company reinstated its mining claims. The directors of the company thought well enough of those mining claims to relocate them, although I personally did not; but I thought enough of them to keep my own stock, and I also advised the people who owned stock in the Union Associated Mines Company to keep their stock. I advised them by a circular letter that I myself composed. I gave this advice to them, as a business man, and as an investor in the Union Associated Mines Company, and as a director of that company, and as an officer. (Tr. 118) I thought the Plymouth oil deal was a good deal, and I held my stock all of the time, even with a rise in the market; and I still have it. I did not feel justified in selling my stock for two or three cents because I expected it to go a little higher, because I knew from my experience that the stock had gone considerably higher on the Salt Lake Stock Exchange. I thought that the interest that the company had in the well justified the value of the stock.

Re-Cross Examination

By Mr. Blue:

I suppose all of the income that the Union Associated got after it got its interest in the Plymouth well, came from the Standard Oil Company of California by that

(Testimony of Zell Truman)

Company's checks. I received a dividend on the stock that [14] I owned in the Union Associated Mines Company. I owned 9,500 shares. The Union Associated Mines Company is still in existence and is functioning in a way. Since that Company's deal with Plymouth in September, 1938, in addition to receiving the 50 per cent interest in the Plymouth No. 1 well in exchange for 635,000 shares of Union Associated stock, at the same time and in consideration for this 635,000 shares of stock, the Union Associated received a 25 per cent interest in a lease known as the Factory Center lease consisting of 70 acres. (Tr. 121) I think also an acre of land in Lomita, and in consideration of additional stock of Union Associated, that company received a 40 per cent participating interest in a well known as Plymouth Well No. 2. I thought it was 600,000 shares for the second well, and in addition the company acquired certain interest in leases in Wyoming, which the company still owns. I understand wells are drilling in the vicinity of those particular leases owned by the company in Wyoming. I do not know that any one connected with th Plymouth Oil Company, either Mr. Gordon, Mr. Fischgrund, or Mr. Davis, was consulted in reference to the acquisition of these leases in Wyoming. Since the deal was made with Plymouth in 1938, the Union Associated acquired sufficient money to pay assessments owed to the Government for relocation on some of the property; and in addition the Union Associated acquired other property, interest in oil properties, and still

(Testimony of Zell Truman)

owns those interests. The stock issued by Union Associated Mines Company for its interest in Plymouth Well No. 1 was issued ex-dividend. It was stipulated that none of this stock was ever sold. (Tr. 124) (Plaintiff's Exhibit No. 2 was offered and received in evidence.) [15]

Re-Direct Examination

By Mr. Evans:

Union Associated Mines Company did not receive anything in the way of income from any oil production from Plymouth Well No. 2. Prior to the Plymouth deal in September, 1938, the Union Associated had not done the necessary assessment work on their claims, and the claims had to be relocated by reason of the fact that the company had lost any rights to the claims. At the initiation of the Plymouth-Union deal in September, 1938, Union stock was selling in Salt Lake City at less than one cent a share, but there was no standard market for it, and very little stock was changing hands. (Tr. 127)

Recross-Examination

By Mr. Cannon:

Union Associated did not own any patented lands anywhere, I think.

(Witness excused.)

(At this point Mr. Cannon read to the jury the letter of September 29, 1938, offered and received in evidence as Government Exhibit 2, reading as follows:)

[PLAINTIFF'S EXHIBIT NO. 2]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah

September 29, 1938.

Dear Stockholder:

Since I have been sending out news letters for the Union Associated Mines Co. over my own signature it has been bad—worse—worst—until it seemed the bottom had been reached and nothing worse could be said. This time I am very thankful that the message is much more optimistic.

A deal has been made that gives the Union Associated a good chance to become a paying investment. Briefly, the Pymouth Oil Company has assigned to the Union Associated 50% of the gross production from a well now being drilled at Torrence; 25% of a 70-acre lease in Wilmington, and 25% in a 1-acre tract at Lomita, all in Los Angeles Basin, California, in consideration of a block of treasury stock. There will be no assessments or expense to the Union Associated stockholders, and more than one-half of the stock will be left in the treasury when the deal is completed.

The Parry family and Director Chytraus interests have been purchased, and a new Board of Directors formed. Wm. Weeks and the writer are the only old members on the new board.

(Plaintiff's Exhibit No. 2)

The new President, R. R. Bray, is an oil man of many years experience in practical oil drilling and thoroughly familiar with the California fields. There are wells on practically every site of our proposed site that have been producing from about the 3,500-foot level. Lately an adventurous company went on down and brought in a fine well at about 5,000 feet. Mr. Bray states, in the light of present developments, the prospects are very good for bringing in a good well at approximately 5,000 feet. The officers of the Pymouth Oil Company impress me as alert business men who know the oil game. They expect to make money for themselves but if they succeed they will also make money for us, as Union Associated stockholders.

Mr. J. H. Morgan, a well-known attorney, with offices at 526 Utah Oil Building, Salt Lake City, Utah, is the new Secretary-Treasurer. Mr. Morgan has clerical help and is much better prepared to handle the business of the company than the writer.

However, both "Billy" Weeks and myself are holding all of our interests in the Company and will be active on the Board of Directors, giving the new management all the assistance in our power.

Of course, the shares you own in the Union Associated, if you have met the past assessments, belong to you, and you are free to dispose of them in any manner you desire, however, our advise is Do Not Sell Them, hold them, and feel free to write us for further information about your Company's progress.

The Company holds the mining property in Big Cottonwood Canyon which can be developed if we bring in a producing oil well.

(Plaintiff's Exhibit No. 2)

The new management desires to express their appreciation to the present loyal stockholders who have carried the load so long, and promise their best efforts to make the Company an asset instead of a liability.

Any stockholder who wishes can address me as heretofore, but the Company business will be carried on at the new address.

Earnestly hoping that the new deal will place Union Associated on the highway of prosperity, I remain,

Sincerely,

UNION ASSOCIATED MINES CO.

Zell Truman, former Manager-Secretary.

New Address

UNION ASSOCIATED MINES CO.

J. H. Morgan, Sec.-Treas.

526 Utah Oil Building

Salt Lake City, Utah

[Endorsed]: Securities and Exchange Commission. Docket No. D 515. Commission's Exhibit No. 223. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters; by Garnett.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 2 Identification. Date Jul. 6, 1944. No. 2 in Evidence. Date Jul. 7, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger. Deputy Clerk.

ARTHUR P. ADKISSON,

a witness called by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is Arthur P. Adkisson and I live at 130 [16] Linden Avenue, Long Beach, and by occupation I am a broker and salesman for Mitchum, Tully & Co. (Tr. 132), by whom I have been employed for a little over a year. I am manager of their Long Beach office, and have been engaged in the brokerage business since 1926 in my own behalf or as an employee of different firms. I was with the firm of Fewell, Marasche & Company, who were members of the Los Angeles Stock Exchange, in 1937 and 1938, and since that time I have joined Mitchum, Tully & Company. I was a salesman at Fewell, Marasche, and at one time occupied a seat on the Los Angeles Stock Exchange, and have been engaged in the securities business upwards of 20 years. I have a fair general knowledge of the securities business and the operation of securities markets.

Mr. Cannon: We will admit he is an expert.

Mr. Manster: No, I am not trying to qualify him for that purpose unless you wish to. My questions are not directed for that purpose.

Mr. Blue: Then I object on the ground they are immaterial.

The Court: That is what I think. [17]

Q. By Mr. Manster: Have you conducted transactions on the Los Angeles Stock Exchange?

A. Well, I have accepted orders to buy and sell, yes.

Q. Do you know how the Stock Exchange operates?

A. Yes.

(Testimony of Arthur P. Adkisson)

Q. Have you bought and sold stock in the over-the-counter markets? A. Yes.

Q. Do you know in a general way how the over-the-counter market operates? A. Yes.

Mr. Blue: We will stipulate that the man is an expert. Otherwise, if that is not the purpose of the examination, I object on the ground the examination is immaterial.

The Court: That could be the only purpose.

Mr. Manster: I am willing to accept the stipulation, Judge.

The Court: Very well. (Tr. 134)

(Witness continuing)

I have known the defendant Gordon over a period of 15 or 20 years, and have effected transactions for him, and I am friendly with him, and also with Mr. Cannon. I know Mr. Fischgrund, but did not know him prior to September or [17a] August, 1938. I know Mr. Collins, having met him in 1937 or early 1938, when he came to work for the firm that I was with. I know Mr. Schirm through his associated with Mr. Gordon; and I know Mr. Morgan. I believe I met him before August, 1938, in Los Angeles. I first had connection with the transactions between Plymouth and Union about August, 1938, when I received a call from Mr. Gordon, who told me that he had been talking to Mr. Siens whom I did not know at the time, and that if I would go to see Siens at the office of the Plymouth Oil Company, he thought he might have something of interest to me. I went to see Siens and had a talk with him.

(Testimony of Arthur P. Adkisson)

Mr. Cannon: I object to it as far as Mr. Morgan is concerned and all the other defendants on the ground that it is hearsay.

The Court: All right.

Mr. Cannon: May I have an understanding that that objection goes to this entire conversation without my having to make the objection, and take an exception to your Honor's ruling?

The Court: Yes. (Tr. 137)

(Witness continuing)

Siens told me that he had received a letter through Mr. Schirm from Mr. Morgan, stating that there was a company in Salt Lake whose stock could be acquired very reasonably, that there were quite a few shares of stock in the treasury; that the stock was formerly listed on the Salt Lake Stock Exchange and was fairly well known in Salt Lake. Siens said that if we could acquire this stock in the mining company and put oil properties into the company for an exchange of stock, and make the stock valuable, and have the stock re-listed, we [18] could enjoy the benefits of the market. (Tr. 138) He said that the idea was to put oil properties into the company in exchange for stock. Within a week or so after that conversation with Siens, he and I drove to Salt Lake City and contacted Mr. Morgan and talked with him about the stock of this mining company, the Union Associated Mines. Morgan said that he had an option on the stock, or that his brother-in-law had such option; that the stock belonged to some family there, and the head of this family had been the president of the Union Associated. Morgan said the option was on approximately 200,000 shares, and

(Testimony of Arthur P. Adkisson)

that there were about 700,000 shares of stock outstanding in the hands of the public and about 350,000 scattered outside of the State of Utah, and that the balance was held in Salt Lake; in other words, about 350,000 of the 700,000 were in and around Salt Lake. When we first started to talk about the stock, it turned out that they did not have a firm option on the stock, but they thought they could get it from the family in Salt Lake, but the price had not been determined. We told Mr. Morgan that our plan was to put oil properties into the Union Associated Mines Company (Tr. 140) in exchange for stock of the Union Associated. This first trip to Salt Lake was in August, 1938, and we finally got down to the point of getting the stock, and paying for it, we found that there was not any money available as Siens did not have any money with him. So I told Siens I would come back to Los Angeles and see if I could raise the money. I came back and contacted Mr. L. R. Julian, a partner in the firm of Marasche and Company. The price I was to pay for the 200,00 shares was \$800.00, or two-fifths of a cent a share. I raised the \$800.00 from Mr. A. A. Julian, a brother of L. R. Julian, and I took the \$800.00 cash to the California Bank in Los Angeles and telegraphed it [19] to the Walker Bank in Salt Lake City with instructions to pay the money to Morgan when they received in exchange approximately 200,000 shares of Union Associated Mines stock. Eventually Morgan transmitted the 200,000 share block of stock to Mr. Siens. Under date of September 2, 1938, I, and Mr. Siens, and A. A. Julian signed a contract which you have now shown me.

(The document referred to was marked Plaintiff's Exhibit 8, and was received in evidence.)

(Testimony of Arthur P. Adkisson)

(Witness continuing)

Under this contract Mr. Julian was to receive \$1500.00 in return for his advance of \$800.00.

(At this point, Plaintiff's Exhibit 8 was read to the jury by Mr. Manster, and is as follows:)

[PLAINTIFF'S EXHIBIT NO. 8]

This Agreement, made and entered into this the second day of September 1938, by and between Arthur P. Adkisson and E. B. Siens hereafter referred to as parties of the first part and A. A. Julian hereafter referred to as party of the second part.

Witnesseth:

That whereas the said party of the second part has paid \$800 in cash for the purchase of 200,000 shares of stock of the Union Associated Mines Co. of Salt Lake City, Utah. Said stock to be issued in his name and delivered to and held by him subject to the following provisions hereinafter set forth:

Enough of the 200,000 shares is to be sold by said party of the first part at such time and at such price as he may deem proper to net him \$1500 in cash. When this has been accomplished the remainder of the 200,000 shares shall be divided equally among the three parties whose names are signed to this agreement, and delivered to the respective parties.

As a part of the consideration for the purchase of this stock *for* the parties herein mentioned, it is agreed by the said parties of the first part that the Plymouth Oil

(Plaintiff's Exhibit No. 8)

Co. of Los Angeles California will consummate a contract to the Union Associated Mines Co. in which the Plymouth Oil Co. wil agree to drill a well on a location next to the Silver Strand Oil Co., well in the Torrence field in Los Angeles county and assign to the Union Associated Mines Co., fifty percent of all the oil and gas received from said well. In return for the 50% referred to above the Union Associated Mines Co., will issue to the Plymouth Oil Co., 635,000 shares of its stock now held in its treasury. It is further to be agreed by the Plymouth Oil Co., that all moneyes received from the sale of all or any portion of the above 635,000 shares will be paid to the party of the second part until he has received \$1500 in cash in part satisfaction of this agreement. It is further understood and agreed that as a part of the consideration of this contract the Plymouth Oil Co. will agree to deliver said stock to the party of the second part when requested.

It is further understood and agreed that when, as, and if any portion of the above 635,000 shares of stock is sold by party of the second part that it shall not be sold below the street market on said stock at Los Angeles or Salt Lake City whichever market is the highest.

It is further understood and agreed that as part of the consideration for this contract that the Plymouth Oil Co. will appoint Arthur P. Adkisson to sell and handle the above 635,000 shares of stock and that he has exclusive right to sell said stock at such price as may be mutually agreed on by himself and the Plymouth Oil Co. and that

(Plaintiff's Exhibit No. 8)

they will give him a written contract to that effect. This however shall in no way conflict with the right given herein to the party of the second part to sell 635,000 shares as described above until he has received the sum of \$1500.

The parties of the first part agree to use their best efforts in promoting the success of said Union Associated Mines Co.

Nothing in this contract shall be interpreted in such a way as to give to said party of the second part more than a total sum of \$1500., cash and the stock referred to above.

In Witness Whereof, the parties hereto have set their hand and seal this the second day of September, 1938.

Arthur P. Adkisson

Arthur P. Adkisson, First Party

E. Byron Siens

E. B. Siens, First Party

A. A. Julian

A. A. Julian, Second Party

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 8 in Evidence. Date Jul. 7, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Witness Adkisson temporarily withdrawn.)

LYMAN L. CROMER,

a witness called by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is Lyman L. Cromer and I live in Salt Lake City and I am a securities dealer, associated with my partner, Mr. Val S. Snow (Tr. 152) with whom I have been associated about 13 years. I was associated with him in 1938 and 1939. The transactions between Plymouth and the Union Company first came to my attention in the early fall of 1938. I know Mr. Barclay of Salt Lake City who was President of the Salt Lake Stock and Mining Exchange and who was also a securities dealer there. [20] I know Mr. John H. Morgan, and in the early fall of 1938 had conversations and transactions with Barclay and Morgan in connection with Union Associated Mines Company stock.

Q. Well, now, fixing as best you can the time, places and circumstances of these conversations, would you tell us first the conversations you had with Mr. Barclay in your own words, just how this came about and what was said with reference to any deal between Union Associated Mines Company and the Plymouth Oil Company?

Mr. Blue: Just a moment. On behalf of the defendants Fischgrund, Gordon, Schirm and Collins I object to these conversations on the ground that it is hearsay, no proper foundation has been laid as to them, and it is incompetent.

The Court: Overruled.

(Testimony of Lyman L. Cromer)

Mr. Blue: I wish to note an exception, and it will be understood that my objection goes to all of this testimony without the necessity of restating the objection?

The Court: It may. (Tr. 153)

(Witness continuing)

Some time in September, 1938, Barclay told me of a deal between Union Associated Mines Company and the Plymouth Oil Company. Union Associated had been listed previously on the Salt Lake Stock Exchange and had been turned to the wall; they had not paid their fee which they should have paid to the Salt Lake Stock Exchange and the stock had been taken off the Exchange, but Barclay told me through this deal with the Plymouth Oil Company of California that it would be listed again on the Exchange; the Plymouth was to get from Union 635,000 shares of its stock for one-half interest in a well to be drilled down in the Torrance field in California; and Barclay said he was going to see that this stock was listed again, and the [21] Company was out of debt, and from the sale of the oil it was to pay dividends. He told me that there was a chance to make money there for myself and for my customers and to buy some stock. (Tr. 155) He said Union Associated was to deliver 635,000 shares of its stock to the Plymouth, and the Plymouth was going to drill the well and give the Union Associated a one-half interest in the returns from the oil well; that the Union Company would have no expense; and that there was a man by the name of Lacy, who was in the banking business, who was going to pay all of the expenses of drilling this well; that they expected the stock to go to \$2.00 or \$3.00 a share; that he had been down to Cali-

(Testimony of Lyman L. Cromer)

fornia, and that it was a very good field, and if I wanted to get in to get in right away. At that time, September, 1938, there was no value that I know of to the stock; I guess you could have bought all you wanted at one-quarter of a cent a share, or \$2.50 a thousand. I placed the utmost confidence on Barclay's representation. He was president of the Exchange and a personal friend of mine. Barclay told me the first time I talked with him about the deal, that he would receive 300,000 shares of stock with which to hold the market down on Union Associated, so that there would not be a runaway market at that time; and that in a short time, as soon as this drilling had started, the stock would go up in leaps and bounds and for me to get in at that time and tell my customers about it; and he would sell me as much of the stock as I wanted. (Tr. 156) He told me he had told the Plymouth people that he would see that the stock was listed when the time came, and when re-listed it would be called at twenty-five cents a share, and he offered me an option at that time on 100,000 shares at 5 cents, which, after I talked with Mr. Snow, we turned down and did not take. After these conver- [22] sations with Barclay, our firm bought for our customers about 200,000 shares. We sold it all to customers. Barclay told me that they had a bunch of high-pressure salesmen down in Los Angeles who were going to sell this stock as soon as the oil came in. He did not give me any names at that time, I think. (Tr. 158) I saw various telegrams posted on the floor of the Salt Lake Stock Exchange at that time with reference to the drilling operations of the Plymouth well.

Mr. Cannon: At this time, in view of the fact that Mr. Blue's objection to the entire line of testimony did not

(Testimony of Lyman L. Cromer)

include Mr. Morgan, I want to join in the objection made heretofore by Mr. Blue with your Honor's consent as far as any conversations had by this witness with Mr. Barclay in the absence of Mr. Morgan are concerned, on the ground that it is hearsay and is immaterial as far as he is concerned. May I have the same objection running throughout the testimony with respect to that matter?

The Court: Yes.

Mr. Cannon: Thank you, and an exception noted.
(Tr. 159)

(Witness continuing)

When the well was spudded a telegram came in, and every few days as the progress of the drilling went on, telegrams came either to Mr. Barclay or to the Exchange and were posted on the board. I remember some of the telegrams.

(At this point a group of 9 telegrams were offered and were marked as Government Exhibit No. 9 for identification.)

(Witness continuing) [23]

Q. By Mr. Manster: Now, having seen this group Exhibit No. 9, does that refresh your recollection with reference to seeing telegrams on the floor of the Stock Exchange in respect to drilling operations of that Plymouth well? A. Yes. (Tr. 161)

I talked with Barclay about the contents of these telegrams; he called me over to his office and showed them to me. Barclay called me up at the time he heard that the [23a] well had come in, on December 13, 1938, and told

(Testimony of Lyman L. Cromer)

me that the well had come in at about 1,000 barrels; that it was the best well they had brought in in this field; and told me when I first talked with him that they were going to pay dividends with the money from this well. About the same time I had conversations with the defendant Morgan. (Tr. 163) He said that they intended to pay dividends if the well produced, and he thought it was a very good proposition. After the well came in, and I had talked to Barclay and he had told me that it was a 1,000 barrel well and a big well, Morgan told me that it was not so, that it was a smaller well. I think if I remember correctly it was around 250 barrels, and that it was not the largest well around there. Throughout 1939 I talked with Morgan two or three times a week, I think; I would call him up and ask him how things were coming, and my customers began to wonder what was the matter with the stock and why the price did not go up any more. So I asked Morgan how things were going and what the matter was. He told me, as I remember, that the wells were petering out, or that the first well did, and the wells were not producing as they had anticipated. So I began to have my customers call Mr. Morgan direct. I asked Morgan when they were going to pay dividends, and he said sufficient money was not coming in to pay them. (Tr. 167) Although, he did tell me they were going to try to pay a small dividend. Morgan gave as a reason or explanation why the company should pay a dividend when the wells were in fact petering out, that they had promised to pay a dividend from the money that they derived from the well, and the company was out of debt. I do not think he suggested anything with reference to the market in the stock if the dividends were paid. I think

(Testimony of Lyman L. Cromer)

our firm sold about 200,000 shares of this [24] stock to its customers in and around Salt Lake, between the time the well came in in December, 1938, until about the time the dividend was paid in August, 1939, at an average price of 3 cents a share. About the time that these telegrams with reference to the drilling operations of the Plymouth well began to be posted on the Exchange, the stock was selling about 3 cents a share. It jumped from practically nothing up to 2 or 3 cents a share, and held at 3 cents all of the time the drilling operations were going on; there might have been a variation of a half a cent a share, that is, from 2½ to 3 cents. (Tr. 169) Mr. Snow made a trip down to California with Barclay, but I made no independent investigation and did not go down to Los Angeles, or look at the well. I talked with Collins at one time, but did not talk to Fischgrund, Davis, Schirm, or Gordon. I placed reliance upon the statements made to me about the deal by Barclay and Morgan. Morgan told me he thought it was a good proposition for the Union Associated. I told him I had bought some stock personally. He told me he thought I had made a good investment, and Mr. Snow bought some stock, and he was very optimistic about the future of the company. Morgan told me, as I remember, that approximately the first well produced around 200 or 250 barrels; and told me dividends would be paid, but he did not say how much they would be. I placed confidence in what he told me, but I did not discuss with him the things that Barclay had told me about the company and the proposition. (Tr. 172) I do not recognize Mr. Collins here. I talked with him for about five minutes and it has been a long time ago and I do not recognize Mr. Collins now. I have not seen him since.

(Testimony of Lyman L. Cromer)

Mr. Morgan introduced me to a James H. Collins in the fall of 1938 in Salt Lake. I asked this man about the deal and he told me it was a good proposition. I told him I [25] was selling it to my customers, and at that time he showed me an option of some kind that he had there. There was another man that was in Salt Lake and he told me he had an option on the stock, and I remember, the top figure was 35 cents a share. It started out low and went up. (Tr. 174) He had an option on so many shares at one figure, and so many many shares at another figure and it varied from $2\frac{1}{2}$ cents to 35 cents, as I remember it. It was a written option to buy stock at gradually increasing prices. I do not recall any further conversation I had with Mr. Collins with reference to the option. (Tr. 175)

Cross-Examination

By Mr. Blue:

I have been a broker about 15 years, and prior to that I was in the mining business, as secretary of mining companies, some of which were listed on the Salt Lake Stock Exchange and some of which were not. I am a partner with Mr. Snow and we are licensed under the Securities & Exchange Commission, and as such make reports to that Commission. The Salt Lake Stock Exchange has on its board mostly mining stocks; no industrials; only one oil company, the Crescent Eagle Oil Company. Stocks on that Exchange have had a wide fluctuation, even Union Associated, when it was listed. (Tr. 178) I do not remember the high on Union Associated when it was listed (Tr. 178), prior to 1938. I do not remember that it went as high as 40 cents. When it was listed, prior to 1938, it had some mining property in

(Testimony of Lyman L. Cromer)

Cottonwood Canyon, and other different claims that were not developed. I do not know whether or not they were producing any ore. If a customer gave me an order to buy or sell, I would execute the order. I relied on Mr. Barclay's repré- [26] sentation. He is dead now. When Barclay told me that the well had come in for 1,000 barrels, Mr. Morgan told me that it was 200 or 250 barrels, but I did not go back to Barclay and tell Barclay what Morgan had told me. I do not know why I did not. I told Snow, and he decided to make a trip down here to find out something about it, and he did come down. When Morgan told me that it was not the largest well, as Mr. Barclay had told me it was, I did not go back and tell Barclay what Morgan had told me. I had begun to wonder about Barclay and things that he was telling me and the amount of stock he was selling. I bought stock from Mr. Barclay. On all purchases of stock that I made for my customers, the customers paid a commission, and I even did that when I was suspicious of Mr. Barclay's story to me, because Mr. Morgan was still telling me it was a good proposition. Barclay had built it up to such an extent that it was to be in the dollars a share class, but I believed Morgan in preference to Barclay. I bought some of the stock for myself and paid 3 cents a share for it in the fall of 1938, because I thought it was a good investment. (Tr. 183) Morgan and Barclay had convinced me because Union Associated Mines Company which prior to that time had only undeveloped mining claims, had purchased a 50 per cent gross interest in the well that was being drilled in the Torrance field in California, in exchange for 635,000 shares of stock. Mr. Barclay told me that the stock would be listed at 25 cents

(Testimony of Lyman L. Cromer)

a share, and he was president of the Exchange, and I knew when he told me that, that the stock would be listed there if he could put it in. And even though he offered me an option of 100,000 shares at 5 cents a share I would not buy them, but I believed the stock would open up on the Exchange at 25 cents a share when it was listed. I could buy all I wanted at the time for 3 cents a share, and [27] bought up to 200,000 shares, and bought 20,000 shares for myself, and 160,000 for customers. Mr. Snow had about 20,000 or 25,000 shares. So far as I know, none of the wires that I saw on the floor of the Exchange are untrue. I knew the well was drilled or was being drilled, and I also relied on the wire that said that the well had come in flowing. There was no wire that I saw that stated the well was flowing 1,000 barrels a day. I do not remember when it was that Morgan said the well produced between 200 and 250 barrels a day, but it was shortly after the well came in. I do not think I ever asked to get any of the money back, that I had paid for this stock, but I got some of it back because we were advised that if we sent certificates in that coincided with certain numbers the money we had paid, plus interest, would be returned to us. I think I sent back 5,000 shares and got back \$150.00, plus 6 per cent interest. I did not turn in all of the stock I bought because there were lots of certificates that they would not take back. I brought down from Salt Lake certain papers that I was required to produce under the subpoena duces tecum (Tr. 189), but I do not have any buy orders. The 1,000 shares of Union Associated bought on January 11, 1939, for \$24.50, shown on these records were bought from Havenor & Pett Brokerage Company, in Salt Lake. (Tr. 190) That

(Testimony of Lyman L. Cromer)

was after No. 1 well was drilled, and before No. 2 well was complete (Tr. 192), and based upon my experience as a broker I actually believed that the stock was worth every penny that was paid for it at the time. Defendants' Exhibit A for identification is a true record of our transactions in Union Associated Mining stock from November 1, 1938, until November 27, 1939, or at least a part of that record. November 9, 1938, I bought 2,500 shares, aggregating \$45.00; on January 4, next, I bought 1,000 shares; and on January 9, it showed [28] 10,000 shares at 3 cents. (Tr. 199) On February 1, 1939, I owned 3,500 shares of Union Associated (Tr. 201), and on August 16, 1939, I bought 17,500 shares for \$87.50, and on November 4, I purchased 12,000 shares for \$60.00, that is one-half a cent a share. Mr. Snow sent in 10,000 shares of stock to the company and got \$314.80 for them, that is 3 cents a share plus six per cent interest; this was in December, 1941. (Tr. 203)

Cross-Examination

By Mr. Cannon:

Most of the stocks on the Salt Lake Stock Exchange are what are called penny stocks (Tr. 205) and sell for less than a dollar a share. The conversation I had with Collins concerning a progressive sales contract was not in the presence of Morgan, but was in the presence of Dick Ray, Collins and myself. Snow came to Los Angeles for the purpose of looking over the Torrance Field after the well came in. Mr. Ray, Mr. Snow and Mr. Barclay came down after December 13 or 14, 1938, when the well came in. Barclay was at that time president of the Stock Exchange, and Snow, my partner, was then secretary of the Exchange. They did not come down in any official

(Testimony of Lyman L. Cromer)

capacity for the Exchange, as far as I know. Before Snow came down he told me he thought he ought to come down and find out how things were going. Mr. Ray was a partner of Mr. Truman's who has testified in this case, and who was at that time a director of Union Associated Mines. Before Snow came down to Los Angeles, we had been buying stock for our own account and also for the customer's; and after Snow came back we continued to buy stocks for our customers and for our own account. (Tr. 207) When Snow came back he told me he had gone over the Field and over the properties in the Los Angeles basin in which the company [29] was interested. During the whole of this time, both before and after Mr. Snow's visit to Los Angeles, I bought stock for Mr. Morgan's account, as Morgan's broker, and charged him and was paid a brokerage commission for so doing. I think I bought 15,000 or 20,000 shares for him and Morgan kept it. He bought it at the current market rate and was charged a regular commission. The stock was bought on the open market over the Salt Lake Stock Exchange. We would buy the stock from whomsoever had the stock available at a price that we were willing to pay for it. Morgan told me at no time to go in and support the market.

Re-Direct Examination

By Mr. Manster:

When Snow and Ray and Barclay came to Los Angeles in the early part of 1939, they did not bring with them any oil men to give them advice as to the nature of the field or what the wells were producing. (Tr. 210) The first 10,000 shares of stock I bought were bought the day Barclay told me the deal had been consummated; and I

(Testimony of Lyman L. Cromer)

paid him 3 cents a share for it; Snow took 5,000 and I took 5,000. Before I left Salt Lake to come here I asked Mr. Snow, and he told me he thought that we had traded in between 200,000 and 250,000 shares of stock between September, 1938, and December, 1939, (Tr. 213) and that we had bought about 25,000 shares of stock apiece. The range of this stock from September, 1938, through December, 1939, would be half of one cent low and three cents high, the half a cent low being in September, 1938, and the three cent high on October 14, 1938, and there was a decline on the stock from that date. (Tr. 213) The stock never came back to the price of 3 cents. As a broker, if a customer asked us to buy a certain stock, it is our duty to fill that order if we can. [30]

(At this point Plaintiff's Exhibit Nos. 10, 11 and 12, for identification, were withdrawn and returned to the witness. (Tr. 218-222))

Recross-Examination

By Mr. Manster:

I was never at any time an officer or director of Union Associated Mines Company.

Re-Cross Examination

By Mr. Cannon:

Barclay and Snow were the president and secretary, respectively, during the whole of the period mentioned, of the Salt Lake Stock Exchange; and Barclay was president of the Salt Lake Stock Exchange at the time of his death. They were, by reason of their services as president and secretary of the Salt Lake Stock Exchange, members of the listing committee which passes upon the propriety of an application for listing on the stock exchange. (Tr. 223)

(Witness excused.)

ARTHUR P. ADKISSON

recalled as a witness by and on behalf of the Government, having been previously duly sworn, testified as follows:

Direct Examination

(continued)

I got the \$800.00 from A. A. Julian to purchase the stock covered in the contract between myself, Julian and Siens. (Tr. 233) Morgan delivered the 200,000 shares of stock to Mr. Siens.

Q. Do you know what Mr. Siens did with the stock?

Mr. Blue: I object to it on the ground it is calling for a conclusion of the witness, and also I object to all of this testimony as to any conversations or actions had by any [31] of the defendants or any of the named co-conspirators in the indictment.

* * * * *

* * * on the ground that it is inadmissible by reason of the fact that there is no *res gestae* here established and there is no evidence of a conspiracy at all. Until there is evidence of a conspiracy any statements made by one conspirator to a co-conspirator are inadmissible on the authorities I cited to your Honor. That will go, if the Court please, that objection, to all of Adkisson's testimony, so that in the event your ruling is adverse to my objection there will be no necessity of restating the objection.

The Court: Very well. Overruled.

Mr. Blue: Exception. (Tr. 233-234)

(Witness continuing)

Julian was subsequently reimbursed \$1,500 for the \$800.00 loan which took place on September 2. Siens

(Testimony of Arthur P. Adkisson)

wanted to get the stock out of Julian's hands as quickly as he could because he was afraid he would throw it on the market and hurt our market; so, he suggested that we talk to Gordon about it, which we did. Gordon suggested we get the money from Lacy. I went to see Lacy and told him I thought if we had sufficient time we could dispose of the stock and pay him back, and in the meantime we did not want the market hurt by this stock being thrown on it. So he said that if that was the case he would give me the money and he gave me a check for \$1,500, payable as I recollect to A. A. Julian. I gave the check to Julian about two weeks after September 2, 1938. (Tr. 236) I made a trip to Salt Lake City about September 21, 1938. Siens had said he was anxious to get [32] a couple of men on the directorate of the Union Associated Mines Company, and the men he had picked out were Mr. Morgan to be secretary and Mr. Bray to be president, and they were going to hold a meeting in Salt Lake, and he wanted me to go over with Bray at that time. (Tr. 237) The purpose of having the meeting was to have these men appointed and to get the contract executed to the Plymouth Oil Company. I went to Salt Lake with Bray, and took with us the Plymouth Union contract, which had already been signed by the Plymouth officers, and we were going to Salt Lake to have the contract executed by the Union officers. A meeting of the board of directors of the Union Company was held about September, 1938, and Bray and Morgan were elected officers, president and secretary, respectively, of the Union. After the contract was made, I wanted to interest the brokers in the stock so we could realize some value on it and give it a market. Morgan introduced me to Barclay, president of the Salt Lake Stock Exchange,

(Testimony of Arthur P. Adkisson)

to Mr. Donald Snow, and one or two others, including Hogle, and Havenor, Pett & Morris. (Tr. 240) We had conversations with Morgan and Barclay, relative to getting the brokers in Salt Lake City interested in the stock and suggested to Barclay that we would appreciate his help in the matter; he said he liked it and that he would help us in any way that he could by trying to get the brokers that he knew personally interested in the stock, and we tried to clean up the cheap stock that was on the market. Barclay suggested that a letter be sent to the stockholders requesting them not to sell their holdings in the Union Associated Mines, and also suggested we furnish him with all the good news that we could concerning developments in the company, progress of the well when it was started, and such leases that they might acquire. (Tr. 241) He said that we would clean up [33] the cheap stock, that is, put in a bid commencing at say 1 cent a share and raising the bids progressively as the stock was available; that is, the stock offered at that price was purchased. In starting a market operation, the first thing you have to do is acquire your stock at the cheapest price, lower than you expect to bid for it to begin with. You have that incentive of having a block of stock which you want to make valuable. Then when you get your stock you figure how much you are going to have to make as your opening bid, which in the case of Union Associated Mines, I believe, was 1 cent. We gave the orders to Barclay, and told him we would take all of the stock that was offered up to 25,000 shares, I believe, at 1 cent a share. Now, when a broker receives such an order he goes on the floor of the Exchange and he makes known to the other brokers that he is in the market or is willing to purchase at this

(Testimony of Arthur P. Adkisson)

price up to a certain amount of shares. If unsuccessful in acquiring all of the stock, he lets that bid stay in perhaps a day or two. If no other stock shows up or is offered, then he makes another bid, according to whatever instructions he receives from his principal. For instance, that he is willing to pay a cent and one-half for a named number of shares. Then he may raise the bid to, say, one and three-quarters cents. (Tr. 244) We placed progressively higher bids for the purpose of cleaning up the cheap Union stock. As I recall, the first bid we placed was for a cent; and then there wasn't any stock forthcoming, so in the course of a day or two, we raised the bid to a cent and one-half, at which time we acquired 10,000 shares. It was again raised to 2 cents, but so far as I know we never acquired any other stock; other than the 10,000 shares at $1\frac{1}{2}$ cents. The highest our bid was ultimately raised [34] was to $2\frac{1}{2}$ cents but during this period the highest price to which the stock was sold was for $3\frac{3}{4}$ cents. These bids were placed with Barclay by me on my own, Mr. Siens', Mr. Fischgrund's, and Mr. Dunigan's behalf. (Tr. 245) Over a period of approximately three months, from the last of September through the end of the year 1938, I placed about 10 bids at the outside, with Barclay; but those bids were not all executed. Only one was an executed transaction. The others were merely open, unconsummated bids. I knew that the letter of September 29, 1938 (Government Exhibit No. 2, in evidence) was being sent out to stockholders about that date. Barclay said the purpose of sending this letter was to keep the stockholders from selling their stock in the open market, and depressing the market. (Tr. 247) Barclay suggested that I furnish him publicity about the well as it progressed; and after the well was

(Testimony of Arthur P. Adkisson)

started, about the middle of November, we would send him telegrams and clippings from newspapers and financial journals of anything that had to do with the progress of the company or the well. I sent some of the telegrams myself.

(At this point, Plaintiff's Exhibit No. 9, a group of telegrams, was offered and received in evidence.)

(Witness continuing)

I sent these telegrams, and Barclay told me he was going to put them on the bulletin board on the floor of the Stock Exchange, because he wanted to keep up the interest of the brokers in the progress of the well, and to keep them interested in purchasing stock. My negotiations with Barclay with respect to the market activities took place before the well actually commenced drilling; but after the contract was [35] signed with Union Associated. (Tr. 250)

By Mr. Manster:

Q. In other words, these transactions that you had with Mr. Barclay with regard to the market started shortly after your arrival in Salt Lake, is that correct?

A. Yes, that is right.

Q. That is about September 21, is that correct?

A. That is correct.

Q. And continued previous to the commencement of drilling operations, is that right?

A. Yes, that is right." (Tr. 251) [35a]

Oil was first produced from Plymouth well No. 1 about the middle of December. About the latter part of October, 1938, the high on the stock was reached at about 3¾ cents. I made a third trip to Salt Lake in company

(Testimony of Arthur P. Adkisson)

with Mr. Bray, and saw Mr. Gordon, but had no specific conversation with him concerning the market in Union stock. It was sometime in October, I think. Gordon came through there and he just stopped one day, I believe, and I talked with him. I don't recall any specific conversation I had with him at the time. He did not come there for any particular purpose. I had conversation with Mr. Morgan. I believe Morgan was present at the first conversation I had with Barclay, and at that conversation the negotiations I have told about were discussed.

Gordon suggested that we borrow \$1500.00 from Lacy, to repay Julian, and we wanted to repay Lacy for that money. Gordon told me that he had a nurse in New York when he was ill at one time, who had just come to the coast and she had asked him on several occasions if he knew of any place where she could make any money. He asked me if I would go to Santa Monica to meet her. I did. Her name was McLean and Gordon introduced me to her, and we talked a while, and Gordon said that he thought he had something that would appeal to her and something worth while, and it had to do with an oil well being drilled at Torrance, and that he thought she could make some money out of it if she would come in. He said she need not hesitate to come in because if she did come in, he would guarantee her against loss. She said she wanted to think it over, and wanted to talk to some of the other girls that might be interesting in taking a chance; and that she would let him know. Gordon said that his guarantee would extend so far as the others were concerned as well. Within the next two or three days,

(Testimony of Arthur P. Adkisson)

Gordon called me and told me he had [36] heard from Miss McLane, and they were going to put \$1500.00 into the deal, and asked me to go out and handle the transaction, which I did. I got a check for \$1500.00 payable to the Plymouth Oil Company, and I wrote out a guarantee in longhand and one of the women copied it on a typeyriter on notepaper, and I signed Gordon's name by me, guaranteeing them against loss in the purchase of the stock of the Union Associated. (Tr. 257) I believe the other woman who bought stock was Miss Klinger. She is the only one whose name I recall. (Tr. 257) The check of \$1500.00 was for 40,000 shares, which would be $3\frac{3}{4}$ cents a share. I gave the \$1500.00 check to Mr. Siens of the Plymouth Oil Company and Siens said he was going to send the check right down to Lacy so we can keep our credit good. I do not know whether the check was sent to Lacy, although Siens told me he was going to send it to him to reimburse Lacy for the \$1500.00 which he had advanced on behalf of Plymouth to A. A. Julian. Some time later, these women made a demand for the return of their money upon giving back the stock to Gordon, which he had sold them. He told me he had paid the women back in return for the stock. (Tr. 262) To my knowledge, Mr. Gordon was not present on any of the occasions when the contract was drawn (Tr. 263) and I do not recall that he was consulted personally or over the telephone in reference to the terms of that contract. After the peak of the stock was reached, of $3\frac{3}{4}$ cents, there wasn't any market in the stock. None of the bids that we placed had been fulfilled. I do not remember when the bids were withdrawn but we were not active in the market. [37]

(Testimony of Arthur P. Adkisson)

Q. By Mr. Manster: You had placed, you said, approximately ten bids, is that right?

A. Yes, that is right.

Q. And those bids were placed at progressively higher prices, is that right?

A. That is right. (Tr. 264)

As far as I know there was not any trading in the stock. I conducted correspondence with Mr. Barclay, I being in Los Angeles and Barclay being in Salt Lake, and discussed the market with him. In the latter part of December, after [37a] the well came in, I decided that there was not any market for the stock, and Siens was disappointed in the action of the stock, and he couldn't sell any. I told him that I had done all that I could, as far as a broker was concerned, I had performed to the best of my ability, and there just wasn't anything more I could do, so I thought I better withdraw. (Tr. 266) The price went down from $3\frac{3}{4}$ cents. Some stock was offered at 2 cents but it was not sold, and I withdrew from the venture early in January or late in December. I have been to the Plymouth offices frequently in the fall of 1938, and up to the early part of January, 1939. Those offices were in the Foreman Building in Los Angeles. Siens was in there at first and subsequently Davis came in. Fischgrund had an office in an adjoining suite with a connecting door, and in a way I had office space there. Gordon's office was in the Subway Terminal Building. I never saw Gordon at the Plymouth office in the Foreman Building. Schirm I think was in Gordon's office and rented space from Gordon, I believe. I do not know whether or not Davis was employed by Gordon, although he was in the office with Gordon. Subsequently, I met Collins in the Plymouth office. Collins had for-

(Testimony of Arthur P. Adkisson)

merly been in the same investment firm that I was with, and I was quite surprised to see him at the Plymouth office. I had no idea that he knew Siens or anyone else connected with the Plymouth Company. One day I was sitting in the reception room of Mr. Dunnigan's office, and Mr. Collins came in with a fellow by the name of Joe Murphy and Mr. Siens. I asked Collins what he was doing there and he said he had just made a deal with Siens to take over this Union Associated stock. He told me he was drawing down big amounts of it and told me that they had put in some new property, and asked me if I knew about the Devil's Den property. I told him I did not. He told me they had put it in for [38] several hundred thousand shares. When I asked him what he thought about it, he said he did not know, but did not think very highly of it; that is, of the Devil's Den lease. These conversations were with Collins about the first of the year 1939, after I had withdrawn from the venture. 635,000 shares of stock were issued to Schirm in connection with the Plymouth Union contract. (Tr. 271) I do not know whether Schirm endorsed all of the certificates for 635,000 shares, but I know he endorsed some of them. I do remember some telephone conversations between Siens and Gordon in regard to material for the well, pipe, etc. This was during the drilling of the well, and I particularly remember one long distance telephone conversation with regard to casing for the well. This would be around the first of December, sometime after they started the drilling of the well. Siens put the call through the Plymouth office to Gordon. We had to have pipe, and I was there when Siens put the call through. There were other conversations at which I was present

(Testimony of Arthur P. Adkisson)

but I do not recall anything specific, but they were in connection with the drilling operations. I do not think I put through any long distance calls to Mr. Gordon. I paid my own expenses on the three trips that I made to Salt Lake. I only got \$100.00 from Siens at one time but that did not cover all of my expenditures. I was supposed to receive some stock. Siens was to give me 25,000 shares, and then he did not want to do it. So, I told him that I owed Mr. Gordon some money, some stock, and so he got Mr. Gordon on the phone and asked Mr. Gordon if he would accept a cancellation of my debt for that stock, and Mr. Gordon said that he would. So, in consideration of not taking any Union stock my obligation to Gordon was cancelled. I do not recall William Millener. I met McEvoy in the Plymouth office, but I [39] do not think he was with Collins at the time. I know Christian Vrang (Tr. 276) who had office space in Mr. Gordon's office. I am familiar with the signatures of Gordon, Fischgrund, Siens, Barclay, Morgan, Schirm and Vrang.

(At this point, a draft on the California Bank of Los Angeles for \$800.00, bearing the signature of A. P. Adkisson, that was sent to the Walker Bank in Salt Lake in exchange for the 200,000 shares of Union Associated stock was offered and received in evidence, as Exhibit No. 13.)

Mr. Blue: If the Court please, all this, of course, is subject to the objection I made as to the incompetency of this type of evidence until the *res gestae* is established, and with that understanding, of course—

The Court: All right. (Tr. 279)

(Witness continuing)

(Testimony of Arthur P. Adkisson)

I had conversations with both Morgan and Barclay with reference to the re-listing of the Union stock on the Salt Lake Stock Exchange, the first conversation being with Mr. Barclay, approximately the first time I talked to him about the stock. We thought that the thing to do would be to have the stock re-listed on the Stock Exchange. Then I talked to Morgan about it. He was secretary of the company and it would be up to him to prepare the papers for the Securities and Exchange Commission and the Salt Lake Stock Exchange. Listed stocks have a great advantage over unlisted stocks in the market because your sales are reflected on the board every day, they are on the tape; whereas, in unlisted stock it is a matter of having to go around and contact several brokers or one broker who has become identified with this [40] stock as a specialist in it. A listed stock attracts more attention. I know that I am named as a conspirator in this indictment. (Tr. 280)

Cross-Examination

By Mr. Cannon:

I never did conspire to defraud anyone. The way they handle a listed stock in the normal course of business operations is that the stock is offered for sale, and it is called on the board, and the man in charge of the particular stock exchange calls the stock and asks for a bid or offer. The man who calls for the bid is an employee of the stock exchange. (Tr. 282) On listed stocks the transactions are quoted in the papers each day; and on unlisted stocks the transactions take place on the floor of the exchange, but they do not carry them on the board in the exchange room. And an "over-the-counter" market is one where stocks are not listed, they are just traded

(Testimony of Arthur P. Adkisson)

in offices or any other place. A number of Bank stocks are unlisted and are traded in "over-the-counter" market. All fire insurance companies are unlisted, as well as many utilities stocks. When I talked with Mr. Barclay I thought it would be a good idea to re-list the stock on the exchange, knowing that it had formerly been listed on the Salt Lake Exchange. I discussed the matter with Morgan and talked with him concerning the preparation of the application to list. In the normal operations of listing a stock, an application is made to the Listing Committee or to the Board of Governors of the stock exchange and after they have passed upon it, the stock is then approved by the stock exchange, and as a matter of practice they must then file that information with the Securities Exchange Commission of the United States. And after it goes to the Securities [41] Exchange Commission on the form which they provide, the stock is then held up for trading on it as a listed stock until the Securities Exchange Commission has an examination made of the prospectus or the application to list. (Tr. 285) In connection with this Union Associated stock, we offered to buy up to 25,000 shares at 1 cent a share. I gave that order to Barclay. We did not buy any stock at 1 cent a share, but in a few days we raised the bid to $1\frac{1}{2}$ cents, which was done for the purpose of inducing loose stock to come in. We bought 10,000 shares at $1\frac{1}{2}$ cents. Then we raised the bid again and tried to get the stock at a higher bid. I did not offer any of my own stock for sale on the market at $1\frac{1}{2}$ cents, or at any other higher price. In October, before the well was completed, the stock reached a peak of $3\frac{3}{4}$ cents; but this was after the contract had been made for the drilling of Well No. 1, which contract gave to Union Associated a 50 per cent interest

(Testimony of Arthur P. Adkisson)

of the gross production of the well to be drilled, for which Union Associated was only giving stock. I left the bid at 1½ cents stand for a while, and thereafter raised the bid to 2 cents, but did not acquire any stock at that price as none was offered, although our bid was standing at 2 cents. And I did not feed any of my own stock into that market either. (Tr. 288) At no time did I conduct any wash sales over the board or over the counter. No wash sales or transactions were carried out in this stock that I was handling. Under the rules of the Securities and Exchange Commission, I understand, any person owning 10 per cent of stock in a company that does any trading it it must report the trade. I placed approximately 10 bids with Mr. Barclay between the middle of September and the first of 1939, I guess, but only one of those 10 bids was consummated, and the rest were never carried out because no stock was offered at [42] that time. In connection with the 200,000 shares of Union Associated stocks that we have discussed, I paid \$800.00 into the California Bank, and sent it to Salt Lake with instructions to pay it over to Mr. Morgan, or to his order, when he delivered to the Bank there in Salt Lake approximately 200,000 shares of stock. I obtained this \$800.00 from Mr. Julian and he took a lien on that stock and insisted upon having that lien until he got back \$1500.00, or a \$700.00 profit on the transaction. A few weeks later he became restive about his money, and wanted his money out of it. So, I went to Mr. Lacy and told him about the transaction and asked him to let me have \$1500.00 to pay Julian. Later, to get the money to pay back Mr. Lacy, I had the transaction with Miss McLean and the other persons, and received a \$1500.00 check pay-

(Testimony of Arthur P. Adkisson)

able to the Plymouth Oil Company, but I did not deliver that specific check to Mr. Lacy, but delivered it to Mr. Siens. What he did with it I do not know. Only he told me he was going to pay Lacy with it. I met Mr. Collins in the Plymouth office just about the time I was leaving the deal, and the talk I had with Collins about the Devil's Den property was not held the first time I met him in the Plymouth office. It was some time later that I had that conversation with him. He did not think very much of that particular lease then. I do not know whether or not that was after he had filed a civil suit against the Plymouth Oil Company.

Cross-Examination

By Mr. Blue:

At the time Collins told me about the Devil's Den lease, he also told me about the Torrance deals, and that he believed the Union Associated Mines Company had made a wonderful deal; he was quite enthusiastic about it, and I myself [43] thought it was a good deal, because it was a most unusual deal. The company was offered for 635,000 shares of its stock an interest in a well that was to be drilled in a proven territory, and assuming that they got a well without any overhead at all, 50 percent interest in that well with a settled production of 200 barrels, the way they used to figure these things, it would be worth about \$1,000.00 a barrel for settled production. In other words, if they had a 100 barrel well with settled production, the price fixed on the well would be \$100,000.00. In the meantime, they had not taken any of the old assets of the company, and I knew that the stock was listed on the Salt Lake Exchange at 20 to 25 cents a share, and I knew that the company had put back into its properties

(Testimony of Arthur P. Adkisson)

\$200,000.00 or \$300,000.00, and that the stock had died a natural death with the death of the president of that company who owned a controlling interest. (Tr. 298)

Before engaging in the securities business, I was in the banking business connected with the Merchants National Bank in Los Angeles as a vice-president. I have lived in Los Angeles 30 years, and have known Mr. Gordon 15 to 20 years, and during that time his reputation as to truth, honesty and integrity has been the very best. The typewritten note signed "Fred V. Gordon by A. D. Adkisson," dated October 24, 1938, was signed "Fred V. Gordon by A. D. Adkisson" by myself on that date. I delivered that document to Grace T. Walker at the time I received a \$1500.00 check (the document referred to was marked Defendants' Exhibit B, and received in evidence.) None of the statements in Plaintiff's Exhibit 9, telegrams or wires, that were sent to Mr. Barclay are untrue.

Mr. Blue: I am going to read these wires to the jury:

"Los Angeles, California, November 12. [44]

"J. A. Barclay.

"Started drilling Union Associated well yesterday, 384 feet deep this morning. Will keep you posted. Regards.

"A. P. Adkinson."

The next wire is dated November 16, 1938:

"J. A. Barclay,

"New House Building, Salt Lake City, Utah.

"Union Associated well 2209 feet eight o'clock this morning. Regards.

"A. P. Adkisson."

(Testimony of Arthur P. Adkisson)

The next wire is dated November 25, 1938:

"J. A. Barclay,

"New House Building, Salt Lake City, Utah.

"Pleas cancel my order to sell stop Drilling ahead
at 4265 feet stop Will be well into sand by Monday.

"A. P. Adkisson."

The next wire is dated November 30, 1938:

"J. A. Barclay,

"New House Building,

"Salt Lake City, Utah.

"Taking last core at 5135 today. Will then run
formation tester then set pipe and cement. All this
work will be completed in next twenty-four hours.
Everything working perfectly. Regards.

"A. P. Adkisson."

The next wire is dated November 29.

* * * * *

"J. H. Barclay,

"New House Building, [45]

"Salt Lake City, Utah.

"Just came from the well. It is drilling below 5000
feet in the oil sand. Plenty of oil showing in the
ditch and it only a question of hours until the Union
Associated will have a producers. Regards.

"A. P. Adkisson."

(Testimony of Arthur P. Adkisson)

The next wire is dated December 1:

"J. A. Barclay,
"New House Building,
"Salt Lake City, Utah.

"Took last core last night. Shows excellent sand. Ran formation tester. Picture perfect. Running casing now. Will be landed in three or four hours.

"A. P. Adkisson."

Now, here is a wire that is dated November 18, 1938:

"J. A. Barclay,
"New House Building,
"Salt Lake City, Utah.

"Three thousand two feet in Union Associated well eight o'clock this morning. Drilling ahead. Regards.

"A. P. Adkisson."

Incidentally, these telegrams will have to be re-assorted. I will read the last wire here, which is dated December 30, 1938:

"J. A. Barclay,
"New House Building,
"Salt Lake City, Utah.

"Could not make delivery at your price. Morgans returns tonight. Deal all complete. [46] Derrick erected for second well. No sales coming from our people here. Regards.

"A. P. Adkisson." (Tr. 301-304)

(Testimony of Arthur P. Adkisson)

(Witness continuing)

Barclay had said that there had been some sales on the Salt Lake Stock Exchange coming from Los Angeles and I tried to find out if anybody in Los Angeles was connected with the selling of that stock, but I wasn't able to find anyone. I at no time charged any commission or any compensation for any transactions that I made in connection with these deals. All I got out of the deal was the \$100.00 that was paid to me for expenses of one trip to Salt Lake, and the shares of stock, amounting to 20,000 shares, which were supposed to be coming to me, and they were given to Mr. Gordon to extinguish an obligation that I was owing him. I owed Gordon some stock in connection with a brokerage transaction, to the extent of about \$750.00. This 20,000 shares that Gordon agreed to accept was in extinguishment of that \$750.00 obligation. During this time there were wells surrounding Well No. 1. (Tr. 306) Prior to the time that I entered this transaction, I had made an investigation of the Torrance Field, and saw that there was considerable drilling activity in the field, particularly at that end where the Plymouth lease was. I read some geological reports on the Torrance Field, one of them by Mr. Vrang and another by a man named Soyster. (Tr. 309) I know a man by the name of Schirm, and remember having a conversation with him in reference to his refusal to endorse a stock certificate. This was the latter part of December, 1938, in the office of the Plymouth Oil Company in Los Angeles [47] and Schirm was asked to endorse the certificates of Union Associated Mines Company that stood in Schirm's name. Siens asked him to do it, and he said he would not, and when I asked him why, he said that

(Testimony of Arthur P. Adkisson)

Siens had promised him some stock, and when he asked Siens for it the other day, that he would not give it to him. For that reason he had refused to endorse the stock. Then I asked him if he would endorse it as a personal favor to me, and he said he would, and he did. At that time he told me he was through with the deal, and I never saw him again in connection with the deal. (Tr. 311) Siens told me that Schirm was no longer connected in any way with the deal. That was in December, 1938, and I do not remember seeing Schirm around the office after that time. I got information that Plymouth Well No. 1 came in as a producer, and I told that to certain people who were interested in the stock. I was told by someone that they estimated that the initial production was between 300 and 500 barrels. Siens told me that. Fischgrund did not; neither did Gordon. No one told me that except Siens, who is now dead. I am licensed under the Securities and Exchange Commission, or rather, under the State of California Corporation Commissioner. I went up to the Securities Commission of the State of Utah in September, 1938, when I went to Salt Lake City with letters of introduction from three of the local banks here to Mr. Gull, who was Corporation Commissioner of Utah and situated in Salt Lake City. I talked with Mr. Gull about the Union Associated Plymouth deal. Before going to Salt Lake, I had been out to the Torrance Field, but I do not remember just when, and I saw derricks there in the location of Plymouth Well No. 1 and surrounding that location, and I read newspaper articles published in the financial sheet of the Los Angeles newspapers [48] as to the progress made in the drilling at the Torrance Field. These newspaper clippings were shown to me

(Testimony of Arthur P. Adkisson)

while I was in the Plymouth office, regarding the Plymouth and other wells. I placed bids for the purchase of Union stock for myself, Siens, Fischgrund and Dunnigan. (Tr. 318) These orders that I speak of were placed as coming from Fischgrund and Dunnigan through Siens. After I took these orders from Siens I talked to Dunnigan about it, but I do not recall specifically that I talked to Fischgrund about it. I do not recall the exact conversation I had with Miss McLean and the other women when I went out to see them, except that Gordon recalled to her mind that she had asked him on different occasions to look for something for her that she could make some money in. He said, "I think I have something that will be of interest to you, and I would like to see you come in," or words to that effect, and "if you do come in I will guarantee you against lost." Then we went away. She did not give us any money, and he did not ask for any that day. He told her to think about it and let him know. Then afterwards, I went out there and got the \$1500.00 check. Gordon was not with me at the time, but he authorized me to sign his name by myself. I have been told that these women got back their \$1500.00. [49]

Mr. Morris: At this time I would like to move the association or substitution as attorneys for Mr. Collins of Mr. David Cannon and myself, Thomas Morris, as attorneys for Mr. Collins in place of Mr. Morris alone.

The Court: Very well. (Tr. 324)

ARTHUR P. ADKISSON,

a witness called by and on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(continued)

By Mr. Blue:

I first became interested in the sale and distribution of Union Associated Mines stock in August of 1938, and continued my association in that capacity until the latter part of December of 1938, at which time I severed my connection with the deal. Rigging a market involves a lot of things. We placed bids in there at progressive prices but there was only one purchase made during the entire time and that was of 10,000 shares at one and one-half cents, and I paid a commission on that sale to Mr. Barclay the broker from whom we bought it. A rigged market is one where one person, or a group of persons who join together in a scheme to raise the price of stock and by purchases and sales between themselves establish a fictitious market; but there were no purchases and sales between ourselves in this stock. Based upon my definition of a rigged market, there were no purchases or sales between ourselves other than the 10,000 shares, but that did not, according to my definition, constitute a rigged market. I have heard from whom Mr. Barclay bought those 10,000 shares, and while I [50] did not know personally from whom Barclay bought it, it was my understanding that he bought it from Mr. Morgan's brother-in-law, but I did not tell him, the brother-in-law, to sell.

(Testimony of Arthur P. Adkisson)

Mr. Blue: All right. Now, if the Court please, yesterday I asked this witness a question as to whether or not he had received information from a certain geologist or geologists, known as Vrang and Soyster, in reference to the Torrance Field before he became actually interested. That question was objected to on the ground that it called for hearsay and the objection was sustained. * * * I offer to prove, if the Court please, that if this witness would be permitted to testify and answer the questions that I would propound to him in reference to the geology and the reports that he had received on the Torrance Field, * * * that I would prove that two competent geologists, one Christian Vrang, V-r-a-n-g, and one M. H. Soyster, S-o-y-s-t-e-r, had written reports which came to the attention of this witness, who is charged as a co-conspirator in this particular case, wherein in these written reports it was stated that certain locations * * * in the Torrance Field, which were subsequently drilled upon by the Plymouth Oil Company, were sure-shot locations for production and that wells drilled on these locations would produce in excess of 500 barrels a day; also that in the Torrance Field there were scores of wells drilling and scores of wells had been brought into production, and based on the production that was obtained in the Torrance Field from these wells that had been drilled just a few months prior to and during this time, that this witness receiving those reports relied on those reports, and that he would so testify. (Tr. 327-328-329) [51]

(Testimony of Arthur P. Adkisson)

The Court: * * * Objection sustained. The jury will disregard the argument of counsel.

Mr. Blue: I will note an exception, if the Court please. (Tr. 332)

Re-Direct Examination

By Mr. Manster:

Briefly stated, my explanation is that a rigged market is an artificial market, one that is not formed by the natural laws of supply and demand. (Tr. 333) Mr. Barclay and I had placed bids in Salt Lake over the counter market in respect to the Union Associated Mines Company stock. My connection with the Plymouth group was to dispose of the stock of the Union Associated Mines Company. I received instructions from Mr. Siens, but I do not believe I received instructions from anyone else connected with the Plymouth Company, either Gordon, Davis or Fischgrund, as to placing bids with a broker. I placed bids with Barclay at progressively rising prices, and by placing progressively higher bids that affects the market so as to cause it to rise; and by raising the market price in that fashion I would say that that was rigging the market, but there was only one purchase made at that time of 10,000 shares at $1\frac{1}{2}$ cents, which purchase was made on September 27, 1938, or thereabouts. There was another sale made on the next day of that same 10,000 shares at 3 cents, so there was a $1\frac{1}{2}$ cent profit over one day in that transaction. It is the usual custom in the brokerage business to be supplied with funds when you place a bid. You trust your client, and if he places the

(Testimony of Arthur P. Adkisson)

bid with you, you either know his ability to carry it through and put it in, or else you don't accept it. I received funds from Siens with which to pay [52] for the 10,000 shares that was purchased. There were no other orders ever executed, because there wasn't any stock offered at those prices. It was the purpose to prevent sales of stock at this time so as not to depress the market. Barclay made numerous complaints to me about sales in this stock, selling orders in this stock from Los Angeles which depressed the Salt Lake market, and that in my opinion was one of the reasons why this stock did not rise according to expectations. I received some information that Well No. 1 came in between 300 and 500 barrels, getting this information from Siens. Davis was keeping the books of the Plymouth Company, and was the responsible officer in that company to keep production records. You do not get the production records until the end of a run. You do not get them at the time the well came in; at least, he did not have them. I never did see any record to the effect that 300 to 500 barrels was received as the initial production; and I never was down at the drilling site at the time to check on that. I never did actually find out what the well came in for at the time, and I do not know that I ever repeated any statement to anybody about the production, but kept it to myself. I had heard later that after the women who purchased the 40,000 shares of stock in which Gordon and I participated, bought some other stock in Union Associated Mines from Mr. McEvoy.

(Testimony of Arthur P. Adkisson)

Re-Cross Examination

By Mr. Cannon:

I placed this order with Barclay and bought 10,000 shares at 1½ cents. I haven't any idea who it was sold to. (Tr. 343) [53]

Re-Cross Examination

By Mr. Blue:

That was a free market in Salt Lake on this stock, for the reason that there evidently were sales going on, much to Mr. Barclay's distress, and they were apparently coming from Los Angeles, but as far as I know it was none of the stock that was in the Plymouth Oil group.

(Witness excused.) (Tr. 346)

Mr. Manster: At this point we have a number of letters to introduce. (Handing) (Tr. 346)

* * * * *

Mr. Evans: As I understand it, your Honor, the status of it now is that it is stipulated on behalf of all defendants as to the signatures, the dates, the receipt, and so on of the letters, and that there is no objection to the letters, which will be marked Exhibit 14, being in evidence at this time, subject only to a later motion to strike certain of the letters if their materiality is not shown in the scheme or the case. Is that correct?

Mr. Cannon: His understanding is correct.

The Court: All right. Let us mark the letters in evidence so we won't have to go through all this again.

The Clerk: Plaintiff's 14.

(The documents referred to were marked Plaintiff's Exhibit No. 14, and received in evidence.) (Tr. 348-349)

JOHN W. ORTON,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows: [54]

Direct Examination

By Mr. Evans:

My name is John W. Orton and I live in Salt Lake City, and I am in the business of public accounting. I produced a large box of records which are now in the court room, and brought them down from Salt Lake City, in connection with a subpoena duces tecum. (Tr. 352) Those books and records consist of general cash, general journal, and general ledger and the stock records. I received these books and records in the summer of 1938.

Cross-Examination

By Mr. Cannon:

I kept those books and records from 1938, in the summer, when I received them. They are all that I know of, and are correctly kept.

Mr. Cannon: As far as the defendants are concerned, and the documents, no further foundation need be laid for their introduction into evidence, but each of the defendants reserves the right to strike, to make a motion to strike them, in the event they are not connected up with the defendants.

Mr. Blue: And in addition thereto, to which we agree in every respect with what Mr. Cannon has stipulated, we also specifically want to have it understood that we have the right to strike any and all entries prior to or subsequent to the dates set forth in the indictment.

Mr. Cannon: That is right.

(Testimony of John W. Orton)

The Court: All right. (Tr. 354)

(At this time, the books and records were referred to as Government Exhibit 19.)

(Witness Orton temporarily excused.) [55]

WERNER J. WAPPLER,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn and examined, testified as follows:

Direct Examination

By Mr. Evans:

My name is Werner J. Wappler and I live in Denver, Colorado, and I am at the present time District Investigation Chief of the War Production Board, and was formerly employed by the Securities and Exchange Commission by whom I was employed for seven and one-half years. I was so employed in 1938 and 1939, and was an accountant-investigator. I have never practiced public accounting, but I majored in accounting and received a college degree from Ellsworth Collage, Iowa Falls, Iowa. After graduation I engaged in manufacturing accounting first, and then for ten years was engaged in the business of brokerage accounting. As an employee of the Securities and Exchange Commission, I conferred with defendant Morgan in Salt Lake City, in February, 1939, in June, 1939, in September, 1939, and once in 1940.

Mr. Evans: Your Honor, we have marked two additional batches of letters as Exhibit 15 for identification and Exhibit 16 for identification. Those are the letters

(Testimony of Werner J. Wappler)

to which we previous referred, which will be examined by counsel at a recess.

(The documents referred to were marked Plaintiff's Exhibit 15, for identification.)

(The documents referred to were marked Plaintiff's Exhibit 16, for identification.) (Tr. 358)

(Witness continuing)

In my conferences with Morgan in June, 1939, at which I was accompanied by Mr. Geraghty, Morgan delivered [56] to us certain original letters and copies from his, Morgan's, correspondence files. The documents embraced in Exhibit 14 and Exhibit 15 were letters and documents delivered to us by Morgan in June, 1939. The documents embraced in Exhibit 16 for identification were received from J. H. Barclay in his office in the New House Building in Salt Lake City, and delivered by Barclay to Geraghty and me. In addition to the letters contained in Exhibits 14, 15 and 16, there were certain additional letters turned over to us by Morgan.

(Some documents were marked Plaintiff's Exhibit 17, for identification.)

(Witness continuing)

Government's Exhibit 17, for identification, were prepared from the stock certificate books of Union Associated Mines Company and the stock record book, and also the stock register book of that corporation, and a certain portion thereof, of those schedules, were prepared in September of 1939; and the rest of them were prepared yesterday. In preparing them yesterday, I referred to certain of the books of Union Associated Mines which

(Testimony of Werner J. Wappler)

now appear on the counsel table. In September, 1938, Union Associated issued stock in the amount of 635,000 shares in exchange for an interest in Plymouth Well No. 1. This was covered by Certificate No. 3191 on September 21, 1938. (Tr. 363) It was issued in the name of Chris Schirm. The certificate was later returned and thereafter reissued into smaller denominations, on September 27 and September 28, 1938, and totaled 635,000 shares. These were all issued again in the name of Chris Schirm. On February 25, 1939, Certificate No. 4247 was issued for 635,000 shares of Union Associated Mines stock in the name of Plymouth Oil Company for the interest in Plymouth Well No. 2. This certificate was never reissued; [57] it was left in that denomination. On February 25, 1939, Certificate No. 4248 was issued for 235,000 shares in the name of William S. Millener (Tr. 365); and on March 6, 1939, this certificate was broken into several smaller certificates, as follows: 25,000 shares were issued on March 6, in the name of Dunnigan Estates, Incorporated; 174,134 shares were issued in the name of R. A. Dunnigan, on March 6th. There were several certificates totalling 174,000 and on March 6th one certificate for 35,866 shares was issued in the name of A. A. Julian, making a total of 235,000 shares. The 25,000 share certificate issued to Dunnigan Estates was thereafter issued or distributed into the names of two other individuals, as follows: 20,000 shares in two certificates of 10,000 shares each, in the name of Lucretia J. Dean, on August 5, 1939; the remaining 5,000 was split up into five 1,000 share certificates issued in the name of W. F. Gardner on August 8, 1939. The 174,134 shares, issued in the name of R. A. Dunnigan,

(Testimony of Werner J. Wappler)

were retransferred in part, 113,000 shares into the names of other people, 61,000 shares was left in the name of R. A. Dunnigan. The other 35,866 shares, which made up the total of 235,000 shares were issued in the name of A. A. Julian, but none of that has been re-transferred. On August 23, 1939, only 499,000 shares of that certificate first issued for 635,000 shares had been transferred, and that 499,000 shares was held by 42 different individuals; and the remainder, or 136,000 shares was held in the name of Christopher Schirm, as of August 23, 1939. (Tr. 368) In September, 1938, 200,033 shares of stock were issued in exchange for \$800.00, the stock being delivered by John Morgan. The records reflect that certain certificates were issued against that stock as follows: Up to August 23, 1939, 10 certificates had been issued to [58] other individuals, totalling 98,000 shares. That is, I mean in 10 different names. There may have been more certificates. The difference between 98,000 and the 200,000 plus remained in the name of A. A. Julian, and totaled 102,033 shares. (Tr. 370) Prior to the issuance of the original 635,000 shares, in the name of Christopher Schirm, there was no stock of Union Associated Mines Company on the books appearing in his name. The records show that Mrs. Erline Bates (Tr. 371) had issued to her 17,000 shares in 1,000 share certificates, dated January 24, 1939. On March 7, 1939, a total of 15,000 shares in 1,000 share certificates were issued to Miss Grace T. Walker; and on March 22, 1939, one certificate of 26,667 shares was also issued in the name

(Testimony of Werner J. Wappler)

of Miss Grace T. Walker, making a total of 41,667 shares to her. On March 22, 1939, one certificate for 5,333 shares was issued in the name of Bessie G. McLean; and on March 9, 1939, 100 shares was issued to Katherine C. Davis; and on March 22, 1939, one certificate for 4,000 shares was issued in the name of Katherine C. Davis, making a total issued to her of 5,000 shares. On February 8, 1939, a certificate for 2,500 shares was issued in the name of Matilda M. Klinger; and also on the same date a certificate for 500 shares was issued to her; and on March 22, 1939, one certificate for 4,000 shares was issued in her name, making a total of 7,000 shares. On April 25, 1939, one certificate for 1,000 shares was issued in the name of Miss Ida M. Apperson. On May 8, 1939, one certificate for 1,000 shares was issued in the name of Lewis J. Hampton. On January 23, 1939, five 1,000 share certificates were issued in the name of Ila Mae Hutchason. On August 11, 1939, five 1,000 share certificates were issued in the name of R. W. Peet. On February 25, 1939, one certificate in the name of Frank L. Tucker, for 5,000 shares. [59]

(A document was marked Government's Exhibit No. 18, for identification.)

(Witness continuing)

A document consisting of a detail of receipts and disbursements and also a summary of receipts and disbursements of the Union Associated Mines Company for the period September 6, 1938, to October 16, 1940, was received by me from Mr. Morgan, who voluntarily gave it to me in October, 1940.

(Testimony of Werner J. Wappler)

Cross-Examination

By Mr. Cannon:

I talked to Morgan a number of times and asked for his books and records and correspondence files in the case, whatever he had, and he gave me everything without any quibbling at all. He made the delivery voluntarily without any threat from me as to an indictment.

(The documents heretofore referred to and marked Government's Exhibit 18 for identification, were offered and received in evidence.)

(Witness excused.)

JOHN W. ORTON,

recalled as a witness by and on behalf of the Government, having been previously duly sworn, testified as follows:

Direct Examination

(continued.)

By Mr. Evans:

I recall in the fall of 1938, or early in 1939, I worked upon a registration statement in behalf of Union Associated Mines Company for the listing of stock upon the Salt Lake Stock Exchange. I was employed to do the work by Mr. Barclay. This was probably early fall of 1938. I was [60] referred to Morgan's office for the information, and I obtained the information from the books and records. The books of the company were in the possession of the secretary, Zell Truman. (Tr. 382)

Mr. Cannon: We have no objection to offering the document in evidence that counsel now has in his hand, being number 7 for identification, that is, that portion that

(Testimony of John W. Orton)

relates to any transactions occurring within the period of the indictment. This covers everything from the company's inception, but the only part which I think is material, and which I stipulate to allowing it to go into evidence as far as the defendants are concerned, has relation to the matters transpiring after June 4, 1938.

Mr. Blue: There is only one objection I would have on behalf of the defendants Schirm, Gordon and Fischgrund, and that is that it is hearsay as to them, as there is no foundation laid as to the fact that this ever at any time came to their attention. But outside of that I have no objection.

Mr. Morris: The same objection on the part of defendant Collins.

The Court: All right. Overruled.

Mr. Cannon: Exception. (Tr. 383)

Mr. Evans: * * * However, we are offering at this time the portion of this registration statement as contained in the filing made January 31, 1939, following the printed form 10 and made a part thereof.

Mr. Cannon: There is no objection to that. Everything in that file that was received on January 31, 1939, or thereafter we have no objection to, except the ones that have heretofore been noted by other counsel.

Mr. Evans: And made a part even though they might be of [61] an earlier date? Where it is referred to in this filing we insist on their being together.

Mr. Cannon: If they copied something in that from the previous filing and filed something which they copied which was a part of the exhibit filed in January, 1939, we haven't the slightest objection.

Mr. Evans: Very well.

(Testimony of John W. Orton)

Mr. Cannon: Other than the ones counsel have reserved to themselves.

* * * * *

(The document heretofore marked as Plaintiff's Exhibit No. 7, for identification, was received in evidence.)
(Tr. 384-385)

(Witness continuing)

As of December 31, 1937, Union Associated Mines had outstanding 789,229 shares, and immediately prior to the issuance of this first 635,000 shares that was given for the interest in Plymouth Well No. 1, there was 1,424,299 shares outstanding, immediately following the addition of the 635,000 shares. After the second block of 635,000 shares was issued, in exchange for Plymouth Well No. 2, there were outstanding 2,059,229 shares (Tr. 387), and after the issuance of the 235,000 shares on February 27, 1939, to Mr. Millener there were outstanding 2,294,229 shares. I prepared the list of stockholders of record as of August 23, 1939, with the understanding that it was to be used for the purpose of paying a dividend, and delivered that compilation to the Union Company. Government's Exhibit No. 20 appears to be the dividend list of stockholders as of that date, which I prepared. That total appearing on Exhibit 20 is 2,298,299 shares. The correct total amount of Union stock [62] outstanding as of August 23, 1939, was 2,298,229 shares, and the company was incorporated with an authorized capitalization of 3,000,000 shares; therefore, there would be 701,771 shares remaining in the treasury.
(Tr. 391)

(Testimony of John W. Orton)

Cross-Examination

By Mr. Cannon:

The list of stockholders which you show me as of February 28, 1939, was prepared by me, as was also Exhibit 20 for identification which is dated August 23, 1939. The same number of shares were outstanding and of record on February 28, 1939, as were outstanding of record on August 23, 1939. When I talked with Morgan he did not give me any false information that I know of; and no one else did in connection with the preparation of the registration statement; nor in connection with anything else connected with this company, as far as I know.

Cross-Examination

By Mr. Blue:

I have never met Mr. Gordon, nor Mr. Schirm, nor Mr. Fischgrund, nor Mr. Collins.

Re-Direct Examination

By Mr. Evans:

My office in Salt Lake is about a block away from Mr. Morgan's office.

(The document heretofore marked Plaintiff's Exhibit 20 for identification, was received in evidence.)

(Witness excused.)

(At this point, there was offered and received in evidence, under stipulations, Plaintiff's Exhibit No. 21, photostat bank records of the California Bank of Los Angeles, having reference to the payment of \$800.00 for some 200,000 shares of stock, as testified to by Mr. Adkisson.) [63]

E. P. EMERY,

a witness called by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is E. P. Emery and I live in Salt Lake City and I am acting secretary for the Salt Lake Stock Exchange and have been in that position since November, 1931, and have held the position continuously since that date. I have produced the records of the Salt Lake Stock Exchange in connection with the filing of application by Union Associated Mines for listing on the Salt Lake Stock Exchange. Between January 1, 1930, and October 1, 1936, the price range of that stock was $\frac{1}{4}$ cent low, 6 cents high. (Tr. 401) This stock was de-listed on the Exchange December 18, 1936, and the application for re-listing which was filed with the Exchange in January, 1939, did not result in a listing of that stock.

Cross-Examination

By Mr. Cannon:

It was passed by the Board of Governors for listing. I do not have any price range of this stock prior to January 1, 1930. It was on the board six months prior to January 1, 1930. I have met Zell Truman and knew he was a witness in this case, and I know that he is a man of good reputation for truth, honesty and veracity.

(Witness excused.)

Mr. Manster: May I say that with reference to Exhibit No. 16 for identification, as I understand it, there is no stipulation as to the authenticity or as to the mailing or receipt of these letters, * * * (Tr. 403)

Mr. Cannon: We don't want to go through a lot of motions [64] to no purpose. I will say this frankly, if these purport to be letters and telegrams passing between certain persons, none of the defendants here, I might state, and Mr. Barclay, our primary objection to them, when they are offered, is that they are hearsay and have no bearing or binding effect on any of the defendants.

So far as producing a witness to identify them, that she typed them or that they were mailed or received, we don't see the necessity for that. We are not objecting to the foundation of them, but we do, each separately object to them on the ground that they are incompetent, irrelevant and immaterial in this transaction, because they are hearsay to each of the defendants. (Tr. 404)

* * * * *

Mr. Manster: If your Honor please, this exhibit contains letters between the witness Adkisson and Mr. Barclay. They are all within the period of the indictment, and they pertain to the market activities which Mr. Adkisson testified to.

In view of the stipulation of Mr. Cannon, as I understand it now, perhaps if your Honor read these letters, why, their competency or materiality could be decided upon.

Mr. Cannon: * * * (Tr. 405)

My point is that the letters themselves cannot be resorted to to determine whether or not they are competent so far as these men are concerned. That is the point.

Mr. Blue: May I add this, if the Court please? I think it shows particularly the position that the defendant in a case of this kind can be put to if these letters are

received in evidence. The fact that the man Barclay, who wrote these letters, and who delivered them—the fact that he is dead stops us from what is generally the inviolate right of the defendant, [65] to cross examine, because any letters of that kind written voluntarily, self-serving declarations—we have no way to take out any intimation that might be in there that might be misconstrued.

* * * * * (Tr. 405)

Mr. Manster: May I say that Mr. Adkisson, whose participation very much appears in these letters—we have original letters from Adkisson to Barclay—has testified as a witness, and, of course, he may be recalled by either side if they wish to question him about these letters.

* * * * * (Tr. 406)

Mr. Cannon: * * * (Tr. 406) If they do establish by independent proof that Barclay was a co-conspirator, then I realize the fact that his acts and declarations in the furtherance of the conspiracy are binding upon all the defendants. But, in the first place, until they establish the conspiracy by independent proof, not by the letters themselves but by independent proof, that he was a co-conspirator and that there was a conspiracy existing, his acts and declarations are not binding. As I say, that applies to a situation where Mr. Barclay were produced as a witness on the stand and we had the opportunity to cross examine. But when the witness is dead you have the rule further complicated in that we are not given an opportunity to cross examine the man, and that is why I think it is laying a dangerous precedent, particularly in view of the fact that we have here voluminous records that cover this whole course of conduct that

they can resort to, and use other means of proving it if they have any.

Mr. Manster: Judge, I think the probative value of these letters will be quite apparent if you will peruse them.

The Court: Well, they might have probative value; it is a question of whether they are competent. [66]

Mr. Manster: Well, I think their competency would appear from the substance of them.

The Court: Well, whether they would be binding upon these defendants, that is the question.

* * * * * (Tr. 408)

Mr. Cannon: Counsel has now shown me Exhibit 15 for identification . . . (Tr. 409) As far as Mr. Morgan is concerned, I am willing to stipulate that the originals of these letters were written on or about the dates they bear, that they were transmitted to the persons to whom they were addressed in the normal course of the mails, that the telegrams were sent by the persons purporting to send them by telegraph on or about the dates that they bear. We have no objection as far as Mr. Morgan is concerned to the letters being introduced in evidence.

As far as Mr. Collins is concerned, I object to them on the ground that they are hearsay, but I am willing that they should go in evidence at this time as far as he is concerned, subject, however, to a motion to strike in the event they are not connected up.

Mr. Blue: Now, in reference to the defendant Gordon, my objection is as stated by Mr. Cannon. * * * (Tr. 410)

Mr. Manster: This may be offered, then, as Government's Exhibit 15 in evidence.

The Court: Yes.

Mr. Blue: Exception on the grounds noted.

The Court: Yes.

(The documents heretofore marked Plaintiff's Exhibit 15, for identification, was received in evidence.)

* * * * * (Tr. 413)

Mr. Cannon: By the way, we have a whole batch of others, while we are working on letters, that counsel handed me and which he has not included in the other offer. They are [67] some more letters that Mr. Morgan delivered to the Securities and Exchange Commission, according to the testimony of the Securities Exchange Commission witness. I would like to offer those in evidence * * * (Tr. 413)

The Court: They may be Mr. Cannon's exhibit.

The Clerk: Defendant's Exhibit C.

(The document referred to was marked Defendants' Exhibit C, and was received in evidence.)

Mr. Cannon: I understand that they are received without precluding me from making a motion at the conclusion of the Government's case?

The Court: Yes. (Tr. 414)

Mr. Manster: That is satisfactory. May I proceed, Judge?

The Court: Yes.

Mr. Manster: With the reading of certain letters from the Government Exhibit 15 in evidence?

The Court: Yes.

Mr. Manster: Written by J. H. Morgan. (Tr. 415)

"July 29, 1938.

"Messrs. Christion Vrang & Chris Schirm

"612 Subway Terminal Bldg.

"Los Angeles, California.

"Gentlemen:

"(I hope) I have a party here we may interest in the Torrence field if something good could be picked up at a reasonable price. If the Torrence field is too far advanced and bonuses are running too high, let me know what you have that would be the most interesting. Now, I don't want any horseplay on this; if we make this party some money on the first deal we may be able to raise a lot more.

"I also have in mind acquiring a Utah Corporation that is already listed on the exchange, which we could use to move some stock.

"The Bullion Mines Company here had 400 acres at Colinga and the stock has jumped from $\frac{1}{2}\phi$ per share to 11ϕ per share. This has created a little interest in California oil land for mining companies.

"Now, use your heads, and let's have the best deal that can be got out of California.

"Regards to everybody,

"Hurriedly yours," (Tr. 416)

"August 2, 1938.

"Mr. Christion Vrang
"612 Subway Terminal Building
"Los Angeles, California.

"Dear Chris:

"This will acknowledge receipt of your letter of July 31, and the Schedule 'A' attached. I was glad to receive the information in such detail and wish to congratulate you upon setting it up in such fine shape. However, the schdule is a little in advance of our present plans.

"The first step will be to acquire potential oil land and in the acquisition of such acreage to have sufficient time to work out and perfect the financing of a drilling program.

"From the map which accompanied your letter it appears that a third high will be reached Southwesterly. If that area is not now a 'hot spot' it may be worth while to acquire some acreage there. However, our party is in no way married to the Torrance field and if something better develops in another field, it would be better to make the selection at any spot that looks like future development will bring in a new field or extend an old one.

"I don't think we should try to play any area that has developed to the high bonuses. My own (Tr. 417) suggestion would be to keep close track of any area that seems quite probable. Please let me have your reaction and keep me advised as to the amount of money it would take to tie up a block of ground that would justify drilling.

"Enclosed find copy of letter to Sundance Unit holders. Please give this to Mr. Gordon and if he can help to the extent of \$10.00 or \$20.00 I would appreciate it. If things are too crowded, tell him to forget it at this time.

"Snyder's and Dan Kroder have signed up on all the acreage that they are to acquire on Beacon Dome and have agreed to put a rig on location by September 1st. San King and associates have joined with him and I really believe that there is a chance to have the Beacon Dome drilled this fall.

"Best regards to all.

"Sincerely yours," (Tr. 418)

Mr. Cannon: May I read at this time, if the Court please, the letter to which that letter was written as a response? It is in evidence.

The Court: All right.

Mr. Cannon: That letter starts out:

"This will acknowledge receipt of your letter of July 31st."

Here is the letter of July 31st, part of Government's Exhibit 14, addressed to Mr. Morgan.

"Dear Judge:

"Yours of the 29th inst. was received by both Schirm and myself yesterday.

"There is nothing available in the 'hot spot' in the Torrance-Lomita field at a bargain any more. Since the completion of a 1,500 barrel well southerly and southeasterly from the former completions, the day before yesterday, we look for stiffer competition than ever. All good acre lots call for a bonus of not

less than \$1,500.00 bonus and 20% royalty. Deals have involved as much as \$2,000.00 an acre bonus and 25% royalty, and money can be made upon those terms, too.

"I am enclosing herewith a schedule 'A' which should give you a comprehensive picture of how we are able to finance the drilling of a well. We are going ahead on one well on the basis outlined in schedule 'A'. (Tr. 419) Mr. Gordon and his son-in-law, R. R. McLachlen, have in mind a property that we are looking at today in Torrance which may suit you. If it can be had on workable terms will advise.

"There is no chance of losing in the present area as long as one secures a site on structure south and southeast of the old Torrance field, limited, of course, by the width and length of the structure.

"Would suggest that your party be ready to fly here the minute we are able to tie-up (option) a suitable piece of land. \$1,500.00 to \$2,000 will be needed to place the deal in escrow in a Torrance bank. It takes three weeks to pass the title people. Thereafter, about \$15,000.00 will be required to drill the well in. After the *hypotecated* percents are returned the company will enjoy a large income, as you will see from the enclosed schedule.

"I know what you require in the way of press notices and maps which we will send to you as soon as we are able to get them.

"I note what you say about the Coalinga area. The recent Petroleum Securities (an E. L. Doheny company) well is good for 20,000 barrels. Geologists now predict the Coalinga district to be another

East Texas oil pool at greater depth—at the depth where the recent new sand was struck. No doubt the (Tr. 420) Bullion Mines Co. have some producing acreage in Coalinga which might net them a great fortune.

“Will write again tomorrow. With best wishes,
“(s) Christion Vrang.”
Christion Vrang.

Mr. Cannon: I would like to find that Schedule A that is spoken of there.

Mr. Manster: All the papers we have are here. If there was a Schedule A it was not submitted to us.

Mr. Cannon: I saw it this morning.

Mr. Manster: If you saw it we will have it.

Mr. Cannon: Go ahead. I will pick it out.

Mr. Manster: We will read these in chronological order. I think that will be better.

Mr. Blue: Mr. Cannon, may I suggest in reading this letter the name “Christion Vrang, Geologist” is at the head of the letter.

Mr. Cannon: All right.

Mr. Manster: Judge, if you will give us the time we can read every one of these letters. I might say at this point I had in mind reading a certain number of letters and then if Mr. Cannon and Mr. Blue desire to read other letters we would have no objection.

Mr. Cannon: I will not interrupt him any more.

Mr. Manster: If, however, Judge, you feel we should read every one we can do so.

The Court: You are the one that is trying your case.
(Tr. 421)

Mr. Manster: Yes.

Mr. Cannon: I won't interrupt him any more. I am sorry I did.

Mr. Manster: I suggest that the Government be permitted to read what letters they deem material and then counsel can read what other letters they wish.

The Court: After that is done the whole thing will probably be meaningless.

Mr. Cannon: He can do it any way he wants. I won't interrupt him.

Mr. Manster: (Reading)

"612 Subway Terminal Bldg.,

"Los Angeles, Calif.

"August 10th, 1938.

"J. H. Morgan, Esq.,

"526-7 Utah Oil Bldg.,

"Salt Lake City, Utah.

"Dear Judge:

"Your 6th instant answering my 4th instant, to hand Monday morning, the 8th. You advise that you are returning my letter 'marking out what . . . should be included . . .' The letter was not enclosed. Hence I am enclosing a letter what may serve your purpose.

"Am going to see Art Adkisson again, and at the same time make some estimates on the probable earnings. (Tr. 422) It is stated in these parts that the Bullion Mines' stock should be worth 50¢ but so far have been unable to ascertain the bases for such estimates. Will dig into the situation and advise. Seems to me, however, that Bullion is a good buy at 4½.

"Agate well still fishing but adjoining well on Sandford structure down about 5,000 feet.

"We are still fussing away with the Torrance-Lomita area. It's a poor man's field. Ordinarily acre lots would be demanding from \$5,000.00 to \$10,000.00 each, judging by what has happened in the other fields, as per Huntington, Signal, Athens, Lawndale, etc. A 500-barrel well can be obtained for as small an expenditure as \$15,000.00.

"Hoping that all is well with you. With best wishes from the 612-gang.

"(s) Chris
Christion Vrang."

"August 12, 1938.

"J. H. Morgan, Esq.,

"526 Utah Oil Building,

"Salt Lake City, Utah.

"Dear Judge:

"Chris Schirm called my attention this morning to a mistake in my yesterday's (the 11th inst.) letter (Tr. 423) to you. It is in reference to the small oil refinery that Schirm proposed to put into the Golconda. The plant is netting over \$3,000.00 (three thousand dollars) per month. The refinery site is on fee land and we can drill a well on same. An oil well in the back yard of the refinery. That is one for Ripley, Believe It or Not. All we are require to do is to open the back door and let the oil come in.

"I am enclosing a copy of letter having to do with the proposed purchase of control of the Union Associated, once on the Salt Lake Stock Exchange.

Schirm has proposed that you provide safe conduct, ways and means, etc., so that the matter may be consummated. We do not ask your financial help but know that you are familiar with the situation and can help us. If . . . goes to Salt Lake City he will call on you. It now appears that I shall soon be in Salt Lake City myself as A. W. Harper has asked me to come to Shoshoni as soon as he can raise some money. If that comes to pass within the week you should see me there about a week from today and could spend a day with you lining up matters.

"The biggest wells are yet to come in in Torrance. The area is bound to be hotter and hotter. I recommend that we go in now ahead of the higher prices (bonuses) (Tr. 424) and royalties are bound to prevail.

"With best wishes,

"(s) Chris V.

Christion Vrang.

"August 12, 1938.

"J. H. Morgan, Esq.

"526 Utah Oil Bldg.

"Salt Lake City, Utah.

"Dear Judge:

"Now is the time for action in Torrance and all we want is a good corporation so that we need not be delayed by the California Corporation if we have to go the percentage route.

"If the Golconda Company or any other mining company which has been dormant and which has a suitable stock set up and which you can get control

of on a basis that we will not be obliged to lay out any money to secure control, as it is my purpose to use what little money I have on hand for actual development in the field in starting a well and also to get the proper publicity under way to stimulate stock sales.

"I have now a proven drill site that can't miss and have deals well under way for derrick and equipment and so forth which I will put in the deal when you have control. (Tr. 425)

"I also have a verbal option to acquire a small refinery in this field, for stock, if as and when we are ready to go. This I consider a valuable asset as it will insure full production of our well, or wells no matter how many are brought in as well as more profits.

"A close friendship of many years standing makes this refinery deal possible. The plant today shows a handsome profit which can be increased with more facilities.

"I know it will be difficult to consummate a suitable deal by correspondence, so if you have what you know to be a deal I will come there with my principle immediately and assign my holdings and we will be on our way.

"Then we can announce to the press our future program and start active working which will at once have the full cooperation of all brokers there and here. As discussed with you last month, you would be placed on the board as an officer as well as the legal representative.

"Very respectfully,

"(s) Chris Schirm
Chris Schirm.

"612 Subway Terminal Bldg., (Tr. 426)

"August 17th, 1938.

"J. H. Morgan, Esq.,

"526 Utah Oil Bldg.,

"Salt Lake City, Utah.

"Dear Judge:

"Your special delivery of the 17th (Wed.) arrived tonight. I thought it was for me only noticing the J. H. Morgan in upper left hand corner. It is 8 p. m., and Schirm is home, having left the office about 4 p. m. today.

"I am quite sure Schirm will be delighted with the news you have conveyed to him in your letter. I am enclosing herewith a 'Proposed Plan to Finance an Oil Company' and it is going to fit in perfectly with the news you have outlined.

"I am leaving tomorrow night for Salt Lake and hope that either you or Dan Kroder can get me a 'pass' on the Western Air Express. Short on funds as usual but will garner something in Salt Lake somewheres. I think that Chris Schirm will get a check to cover the expense needed as follows: \$50+\$150+\$50 to put the Union Associated Mines Co. in good standing and on the Salt Lake Mining Exchange again. And further think I can take the check with me. I may even be commissioned to get further details from you while up there. I should be in Salt Lake Friday but will see you (Tr. 427) Saturday morning at any rate if compelled to take the bus.

"With best wishes,

"(s) Chris
Christion Vrang."

I will read the proposed plan.

Mr. Cannon: This is the proposed plan attached to the last letter, is it?

Mr. Manster: That is right. (Reading)

“A Proposed Plan to Finance an Oil Company.”

Mr. Cannon: That Vrang sent to Morgan?

Mr. Manster: That is right. (Reading:)

“Under the present Blue Sky law in California it is practically impossible to form a new company and get a permit without so much red tape and loss of time that the possible profit is not worth the efforts necessary to start a new enterprise.

“Realizing that to accomplish almost anything worth while one must have a corporation to avoid personal liability and add strength and stability to the enterprise and to secure the necessary capital, one is compelled to try and find a way to accomplish his object without operating contrary to the law.

“Most people who are attempting to start new enterprises in California are resorting to what is known as a limited partnership or as a closed permit. (Tr. 428) The partnership, of course, does not come under the Corporation Department and while the latter form of operation does come under them it is quite easy to comply with and therefore quite popular.

“Neither of these plans can ever produce success except in a very limited way as capital in sufficient quantities can not be had to insure permanent success in the oil business. Under our present State and National laws it seems that every restriction is placed in the way of new enterprises and the public hesitates to join in new ventures.

“However, there seems to be at present a noticeable desire in the public in general to try and make a start to see if it is not possible to get back a portion of what they once enjoyed and it also seems to be the general opinion that they might do this by joining in the oil business which at the moment seems very hot.

“In keeping with other opinions the writer has also tried to formulate a plan whereby we might join in this movement and get in the oil business which seems to be so easy to make money in, and get it fast, and also it is treated more leniently than wealth created in other ways as to taxation. However, no plan can hope to succeed unless it provides some method that will continuously furnish the operations (Tr. 429) with new capital.

“As pointed out a new company is out of the question if one desires to raise capital, therefore the only method is to secure control of an old company, preferably a mining company whose stock is or has been listed and thru advertising make the public become interested in the issue by drilling wells and telling about it in the papers. The old method of salesmen going and soliciting investors is obsolete.

“The public are, as pointed out, ready for something to make quick money with a small investment, and particularly in oil. Therefore the first thing to do is to form a holding company to operate thru, that is these closed permits are the proper vehicle to apply for permits and they should be composed of men who know the oil business, this will create confidence in the mind of the commissioner and the people who come in the closed permit. These closed permits should be sold at the actual cost of the well, holding the usual 30% necessary to operate the well.

"When a well is completed, or sooner if desired, the well is turned over to the mining company for stock, which in turn is placed on the market to raise new money. The mining company should be a native of a state which has liberal laws and stock can be readily marketed in several states. (Tr. 430)

"For instance, a completed well could be sold to the mining company say, for 300,000 shares, and by keeping 200,000 shares and selling 100,000 enough cash can be had to drill the second well.

"In this manner the original holding company always has control of the mining company. Control of its own company which never sells a share of its stock, excepting the original shares that are issued to its original incorporators and control of the production.

"By studying the past performances of companies which have drilled wells and got production one can readily see how very interested the public is in such ventures. Every company or individual that has completed a successful well as their first venture have never experienced any difficulty in securing further capitor. The principal reason the Standard Oil Company never fails in whatever country or state it starts operations, is not because they can drill wells cheaper or better than the small company, but because their first move before starting business is, they sufficiently finance themselves before starting business. By this method it makes no difference whether their first well is a success or failure, because they go right on until they hit a well.

"By this method explained herein the wells (Tr. 431) could be placed in the mining company only

after they were producers and this method would so instill confidence in the public they would follow your operations like sheep.

“Money was never more plentiful in the U. S. than today; I mean it is practically all laying idle in the banks, mostly thru fear. Therefore to he who can create confidence in the minds of the owners of this capital can automatically have all the available cash needed for any enterprise. No new enterprise has much chance of becoming larger than the imagination of the promoter, and for that reason, one well deals have very little chance of succeeding unless an intelligent plan of continuous operation is planned.”

“August 15, 1938.

“Chris Schirm,
“612 Subway Terminal Building,
“Los Angeles, California.

“Dear Chris:

“Answering your letter of August 19th—”

Mr. Cannon: Pardon me just a minute. I think we can probably stipulate that letter is in error. The letter is dated August 15th and it refers to a letter that has been received of August 19th. The matter was called to the attention of the S. E. C. by Mr. Morgan, that it was an error, (Tr. 432) and the letter was written right after August 19th.

Mr. Blue: We will stipulate that. There is no argument about that.

Mr. Evans: That is correct.

Mr. Blue: Some time in the month of August.

Mr. Manster: (Reading:)

"Dear Chris:

"Answering your letter of August 19th, most of the—"

Pardon me. May I withdraw my reading of the last letter. There is a mistake there and I withdraw it.
(Reading:)

"August 19, 1938.

"Mr. J. H. Morgan,

"526 Utah Bldg.,

"Salt Lake City, Utah.

"My Dear Judge:

"Answering your letter of August 17th in which you state that the Union Associated has 700,000 shares outstanding and that 350,000 is owned in the East and 350,000 in Salt Lake and that we can get 200,000 of this 350,000 Salt Lake shares. Who will own the other 150,000 of the Salt Lake shares and would they play with us? Or would they tear down our market? Are they the same people we would buy from?

"Could you secure a board of directors in (Tr. 433) Salt Lake City who would be men of good standing? Would you act yourself on the board? For your information, here is the way we will operate here. Mr. Gordon has an oil company of which he is president called the Plymouth Oil Co. The McKeons will do the drilling. The Plymouth Oil Co. will take leases and start a well and turn same over to the Union Associated for a certain block of stock and guarantee to complete the well. The well would

be known from that time on as the Union Associated well. Under these conditions do you think the Salt Lake brokers would wake up and take an interest in this stock and try to sell it?

"One of us will leave here not later than next Tuesday morning if you think we can do some business there. We will have with us a Los Angeles broker who can and will talk broker language to your people and the Los Angeles brokers will do their part. I want you to have a letter here for me not later than Monday morning answering these questions and if your letter is favorable you will receive a wire back from me stating the hour we are leaving here.

"Sincerely,

"(s) Chris Schirm." (Tr. 434)

August 15, 1938.

"Chris Schirm,

"612 Subway Terminal Building,

"Los Angeles, California.

"Dear Chris:

"Answering your letter of August 19th, most of the 150,000 shares of Union Associated in Salt Lake will play along with us. There will be a few small certificate that we cannot control but it in my opinion will come in on the first bid at 1¢ or 1½¢.

"I think it will be a serious mistake to use Salt Lake men entirely on your board. The company must have a background of substantial oil men,

which we haven't here. I think Fred Gordon should head the company and Mr. Malia (former Bank Examiner of Utah) act as secretary or treasurer. But you must have a background of oil men to create the interest in the stock. You should be careful not to skim off all the cream in the deal between lessees, Plymouth Oil Company, and the Union Associated. Of course, your brokers will want to watch that as much as interested parties here would.

"With the right kind of set-up I feel quite sure that considerable stock could be moved here in Salt Lake. (Tr.435)

"Expecting to hear from you definitely, I am continuing with the arrangements to acquire the Union Associated.

"Sincerely yours,"

"August 24, 1938.

"Mr. Chris Schirm,
"612 Subway Terminal Building,
"Los Angeles, California.

"Dear Chris:

"I expected to hear from you today. Please advise me the present status of the dealings on the Union Associated and your land in Torrance.

"I can't hold this present deal on the outstanding stock any long period of time, so please advise me at once when you expect to be in Salt Lake.

"Very truly yours,"

"September 3, 1938.

"E. Byran Sienes.

"Dear Sir:

"I hand you herewith nineteen (19) certificates of Union Associated Mining Company representing 170,033 shares for which I have received \$800.00. I hearby agree to deliver additional 30,000 shares (Tr. 436) making total 200,000 shares for said \$800.00.

"Very truly yours,"

The next one is on the stationery of Sidney Fischgrund, Attorney at Law, 707 South Hill Street, Los Angeles:

"Sept. 6, 1938.

"My Dear Morgan:

"Since wiring and writing you, Mr. Adkission and I have been talking it over and we both think there is one vital first step and that is to pay that tax so the company is in reality an entity and can confirm your other directors meeting and also close our deal.

"I don't mean all the debts, I mean the actual payment of the franchise tax. As discussed at the meeting yesterday, one man said ten dollars, of course I know that is not correct. Our yearly franchise tax here is \$25.00 per annum and you may owe two or three years. At any rate we must be in a position to transact business legally immediately.

"Answer by wire.

"Sincerely yours,

"E. Byron Siens (s)

"E. Byron Siens."

Defendant Fischgrund: Stipulate that my name does not appear on that, and that it was not written in my office. I don't know how the stationery was acquired by him. (Tr. 437)

Mr. Cannon: Wouldn't it be stipulated as of this date, September 6, 1938, that the Union Associated owed no other debts than the franchise tax?

Mr. Manster: I don't know.

Mr. Cannon: Well, we will check it. Counsel says he doesn't know. We will check it. I think that is the fact.

Mr. Manster: All right. It may be.

"September 7, 1938.

"Mr. J. H. Morgan,

"526 Utah Oil Bldg.,

"Salt Lake City, Utah.

"My Dear Morgan:

"I am enclosing herein a check for \$75.00 in payment of whatever is necessary to re-establish the entity of the Union Associated Mines Co. I acknowledged receipt of your letter with stock enclosure on the phone. I regret very much the error we made of mailing you an important letter without putting an airmail stamp on it, because as explained I was waiting and waiting for you to wire me stating the amount necessary to reinstate the Union Associated.

"We will expect you to hold a directors meeting immediately upon the payment of this tax and confirm all actions of the last meeting of the directors.

"For your information I am working on a deal which will give the Union Associated an oil well

which (Tr. 438) stands on 72 acres but produces very, very heavy oil, in fact they had to sell the last oil they produced for thirty cents a barrel.

"This 72 acres of land, however, is very stragically located, being about half way between the Torrance and Lomita field and the Bend area, and now that they have struck this heavy coarse oil at 3500 ft. on this property it is very reasonable to suppose that the other sand will be found at the 5000 ft. level. This 72 acres, I proposed to put in with Torrence lease which will as proposed, by Mr. Barkly, stimulate the stock sales. It is my plan at present to have Mr. Adkisson in your city not later than Sunday night with the contract between the Union Associated and the Plymouth Oil Co. ready for signature.

"Everything is moving along satisfactorily here and both Mr. Schirm and Mr. Adkisson are working with me 100%. I firmly believe that in addition to the 72 acres that we will have production in Torrence going into our tank within 30 days or less from the date of this letter. I mean a complete well in which the United will own its full 50% interest. I will be able to tell you more about this tomorrow. In the meantime I will conclude by requesting that you extend to Mr. Clayton my very kindest regards. Mr. Adkisson also wishes to be remembered to you both. (Tr. 439)

"Very truly yours,

"E. Byron Siens (s)

"E. Byron Siens."

The next one is dated September 9, 1938, on the letterhead of Sidney Fischgrund, Attorney at Law.

Mr. Blue: Pardon me for interrupting you. Will you say who signed the letter, for our convenience, instead of giving it at the end?

Mr. Manster: Fine. I will do that. This letter is signed by E. Byron Siens.

Mr. Blue: Thank you.

Mr. Manster: (Reading)

“September 9, 1938.

“Mr. J. H. Morgan,
“526 Utah Oil Bldg.,
“Salt Lake City, Utah.

“My Dear J. H.:

“I have been so busy that I did not get a chance to drop you a line yesterday, but I don't want you to think that I am sleeping on the job, because I eat, drink and sleep our deal. I am trying very hard to get everything ready for the boys to come up there Sunday night. That is I want the properties all tied up in a nice package and everything ready to close our deal. (Tr. 440)

“I have a man who is eminently qualified to be the president of the Union Associated in the person of Mr. R. R. Bray. He was the inventor of Mr. Doheny's Hydrill out of which Mr. E. J. Doheny made many millions. Of course Mr. Doheny was a clever man and after about three trades with Bray, Mr. Doheny owned all the deal.

“Bray is not mercenary, just a wonderful clever technical expert, also a mining engineer. In fact it is through and by his brains the oil industry is able to drill deep holes today. He personally went to

Pittsburgh and showed the Steel Companies' Engineers how to make a drill collar hold together at over a mile down in the ground. He is not only a fine gentleman, but can qualify as an expert oil man in all of its departments.

"He is a friend of many years standing with both Mr. Gordon and me. I know you will like him and get along with him and with such associates we can not fail to build a real company.

"Will have some real news for you tomorrow.

"Sincerely,

"E. Byron Siens (s)

"E. B. Siens."

"P. S. How about the taxes, etc.?" (Tr. 441)

Mr. Manster: On the stationery of the Plymouth Oil Company, from E. Byron Siens to Mr. J. H. Morgan, September 10, 1938:

"Mr. J. H. Morgan,

"526 Utah Oil Bldg.,

"Salt Lake City, Utah.

"My Dear J. H.:

"Received your letter of Sept. 9th and your quotation of the stock distribution is correct.

"Now I want you boys to be satisfied, and if either you or Mr. Clayton are in any way displeased with this arrangement, now is the time to let me know.

"In fact we can only make a success of our business if every one associated with the deal is satisfied and works for the one end: Success for the enterprise.

"No one person can accomplish very much, that is why corporations are formed, to create a harmonious organization, and unless all parties are satisfied, failure is sure to follow. I am more than pleased with our connection with Mr. Bray and I can say this much for him, we the Plymouth Oil Company will not drill on any property that he does not O.K.

"He will be of great value to both the Plymouth Oil Co. and the Union Associated. Now you state you (Tr. 442) expect the company will be reinstated by tomorrow, meaning the 10th or Saturday. I was planning to send Adkisson and Bray up there Sunday night, but if you are not sure of the work being accomplished I will wait until the first of the week.

"In fact I can use the time very advantageously, so I will change our plans to Monday night or Tuesday night. You also mention you will hold a directors meeting if Mr. Weeks returns. Now as I recall it you have three directors right there and can hold a directors meeting at any time you desire. Of course when Bray comes up you will elect him a director and then president.

"Mr. Adkisson is right on his toes and has *there* brokers all on their toes just waiting for the word to go. That is one reason why I want him there when all our arrangements are completed. He will bring the 200,000 shares *back* and have them issued into proper sized certificates for the brokers to handle. I think one of the first things to do is to appoint a transfer agent and as soon as our other stock is issued take the stock book to them and that will give all brokers much more confidence in our project. Oh, yes, one thing you must do at once is

to acquaint yourself with the law on the stamps that goes on the re-issued stock and also on the new stock. However I (Tr. 443) think in our case that every share of the 3000,000 shares capital has been issued and thereby we will save quite some cash. But we want to have it all done right and legal and I will of course leave that point to you.

“Very sincerely,

“E. Byron Siens (s)

“E. Byron Siens.”

This is September 13, 1938, from John H. Morgan to Mr. E. Byron Siens:

“Mr. E. Byron Siens,
“911 Forman Building,
“Los Angeles, California.

“Dear Mr. Siens:

“Enclosed herewith find certified copy of the reinstatement of the Union Associated Mines Company, also, a new resolution made by the company.

“The directors held a meeting this morning and ratified all the acts taken by the former directors held in the meeting of September 6, 1938.

“My suggestion is, that the advances made by you to the Union Associated Mines Company to reinstate the corporation and take care of whatever has to be taken care of should be treated as loans to the Union Associated to be repaid as soon as any money (Tr. 444) is in the treasury of the company.

"I have been working daily on the old minutes and other matters concerning the company, and I think we have everything practically brought up to date. There is still quite a little work to do on the stock books and ledger, and the bookkeeper I had in mind has been sick for a few days. If he doesn't return to his office in the next few days, I think I had better secure another one and have the stock books brought up.

"We all feel that your selection of Mr. Bray is an excellent selection, and I am sure we will all be glad to cooperate with him.

"Please keep me advised of any matters you wish taken care of.

"Very truly yours."

On the stationery of the Plymouth Oil Company:

"September 13, 1938.

"Mr. J. H. Morgan,

"Salt Lake City,

"Utah.

"Dear J. H.:

"I am wondering why we don't hear from you about the company. We have the property all assembled and a commitment to drill a well or start one in Torrence in (Tr. 445) 30 days. The days have a habit of slipping by pretty fast and we want to close our deal there now as quickly as possible. For your information the McKeons cored 800 ft. of nice oil sand in their wild cat south of Santa Fee Springs and we are getting a play there through our con-

nections with Mr. McKeon. Wm. Lacey put up \$10,000.00 cash to make this play with. I am speaking now of the Plymouth Oil Co. However, anything we have the Union Associated can have a part of because we know they can be if handled right our most useful asset.

"McKeon expects this to be the biggest well and field the basin has ever developed. Of course it is over 8000 feet deep but all of California's big wells are coming deep today. We have about run out of shallow discoveries. That's why Torrence has had such a play. And only a short time past it would have been considered deep but today it is past hole digging.

"So moves the world. However the question is: How goeth the Union Associated? If you are ready, we are. Let me have a wire when you receive this.

"Sincerely,

"E. Byron Siens (s)

"E. B. Siens." (Tr. 446)

On the stationery of the Plymouth Oil Company, September 14, 1938, from E. Byron Siens to Mr. J. H. Morgan:

"My Dear J. H.:

"Everything is now in order for us to close the deal between the Union Associated and the Plymouth. After very careful thought I believe the manner in which we should close this deal is to present the contract to the Associated directors and accept the deal and issue all the stock immediately for many reasons. We know to start with that we have to

submit a statement of the Union to this Gov't. department and when we do it should reflect a closed deal. In other words we expect to sell this stock to accomplish our work and we don't want to show a deal half completed that some clerk can say, 'Hold up that deal until you answer a number of questions.' If the deal is closed, the Plymouth gets all of their stock and passes it on to the brokers and the incident is closed and before any questions can be asked the Union owns half of an oil well. Then we are sitting pretty and everybody is satisfied.

"I think everything should be done in a systematic manner to re-instate the company on the board, but there's no hurry about that. The brokers can and will sell this stock 'over the counter' and make more profit than if it were actually listed. (Tr. 447)

"However, on the next well or development we want to do, we will have it listed and we can then enjoy the market the brokers built up out of this first issue. Now as to the properties. We have included three properties: The acre in Torrence, the acre in Lomita and approximately 72 acres in Wilmington upon which there is a well.

"I propose to give the Union 50% of the completed well in Torrence, 25% of the Lomita property and 25% of the Wilmington. It is my plan when we are ready to drill either one or both of the other properties we will make a new deal with the Union and deed them another 25% interest in the property to be developed, for so much stock. In other words it is my intention that the Union will own 50% of each well but we cannot consummate that deal now as we will have to make these new deals as we come

to them. I think you will agree with me that the only way we can feel our deal will be completed is to close it as I have outlined. I personally cannot come up at this time and did not want any one but myself to explain my ideas on the subject to you. At this moment I can't say just what plane the boys will come up on, but I will wire you when they leave.

"Sincerely,

"(s) E. B. Siens.

"E. B. Siens." (Tr. 448)

"P. S. I received both your letters and wire for which I thank you.

"(s) E. B. S." (Tr. 449)

Mr. Manster: This is from John H. Morgan to E. Byron Siens, dated September 14, 1938.

"September 14, 1938.

"E. Byron Siens,
"911 Foreman Building,
"Los Angeles, California.

"Dear Mr. Siens:

"Answering yours of September 13th, I had written you air-mail immediately after holding the meeting of the Union Associated advising you that the company had been reinstated, that a meeting had been held ratifying all the acts and resolutions passed in the meeting of September 6th; also enclosing a certified copy of the reinstatement and a new resolution authorizing the deal between the Plymouth Oil and Union Associated.

"After receiving your airmail this morning I wired immediately, so please advise me if my former correspondence has gone astray.

"Your letters certainly sound very encouraging, particularly the play in South Santa Fe Springs. Looks like with the Plymouth Oil making deals for the Union Associated there is certainly an excellent chance for that stock to go way up.

"I have not answered your second paragraph of September 10th before, because I have not had a (Tr. 450) chance to discuss the matter with Mr. Clayton. As explained to you and Mr. Gordon, Mr. Clayton thought that he should have been entitled to more than 10,000 shares on the first deal, but I think your later suggestion has pretty well solved the problem and especially in view of the fact that we both have been a little successful in buying some of the loose stock. I feel this will be beneficial in both ways, first, because it gives us a greater interest; second, it will assist materially in keeping the poorly held stock off the market.

"I think this practically answers all of your correspondence to date, and again complementing you on your deals for Plymouth and incidentally the Union Associated, I remain,

"Yours sincerely,"

"P. S. Best regards to Mr. Adkisson and Mr. Schirm."

This letter is on the stationery of the Plymouth Oil Company, dated September 23, 1938. This is by R. R. Bray. Maybe you don't want that?

Mr. Cannon: All right, sure.

Mr. Manster: All right. This is R. R. Bray.

"September 23, 1938.

"Mr. J. H. Morgan,
"526 Utah Oil Bldg., (Tr. 451)
"Salt Lake City, Utah.

"Dear J. H.:

"I was thinking that it might be good for the auditor to send me his set up of the new deal in the rough of Union Associated books, before you have him make the actual entry in the books.

"I will submit it to my auditor and perhaps I can give some suggestions that might help the company materially in their income tax payments.

"My man is an experienced oil auditor which helps materially in dealing with the Government.

"I think we should have a letter sent to all stockholders at once telling them of this deal with the Plymouth which might keep their shares from interfering with the market.

"If you have no letterheads and envelopes, we will have some printed if you will send us a copy with address, etc., as you think it should be.

"Got home in good shape, but trip was a little rough.

"Best regards,

"R. R. Bray (s)

"R. R. Bray."

Mr. Manster: Judge, I wonder if I might ask whether you are prepared to rule on the Adkisson-Barclay letters, for this reason. We have been following practically in (Tr. 452) chronological sequence, and I am up to September 23, 1938 now, and those particular letters, I believe, commence with September 23. If your Honor wishes to make a ruling on them, why, we might proceed with it if you rule to admit them in evidence. If not, Judge, I can continue with the rest I have here.

The Court: Go ahead with what you have.

Mr. Manster: (Reading)

“September 24, 1938.

“Mr. R. R. Bray,
“911 Foreman Building,
“Los Angeles, California.

“Dear Mr. Bray:

“Answering your letter of September 23: I will not see the auditor until Monday, but at that time I will go over them with him and get a preliminary setup of the Union Associated books for your auditor to examine.

“Mr. Adkisson suggested that you and Mr. Siens should work out a letter to the stockholders telling them of the new deal. I, too, think that this letter should be sent out immediately so that there would be no interference with the market when the stock starts moving.

“We have no letterheads nor envelopes, so if you will have some printed it would help out (Tr. 453) materially. I think your own letterhead is excellent

and would suggest the same type. The lettering would be as follows:

“UNION ASSOCIATED MINES CO.

“Was. 2130

“526 Utah Oil Building

“Salt Lake City, Utah

“Mr. Adkisson will *not* doubt see you today and will report on developments to date. I think everything is moving along very nicely but be free to call on me for anything that you might think will help matters along.

“With best regard to Mr. Siens, Mr. Adkisson and yourself, I remain,

“Sincerely yours,”

I am skipping two letters in this exhibit 15 in evidence.

Mr. Cannon: You have skipped a lot of them, but that doesn't make any difference as far as I am concerned.

Mr. Manster: I skipped one dated September 27, and another one dated September 27. I have skipped two letters, Mr. Cannon, both dated September 27. You can read them, if you want to.

“September 30, 1938.

“Mr. E. Byron Siens, (Tr. 454)

“911 Forman Building

“Los Angeles, California.

“Dear Mr. Siens:

“Enclosed find certified copy of letter from Mr. Gull, director of the State Securities Commission of Utah. As the letter refers to the letter I wrote

to the commission, I am enclosing a copy of my letter. If you will analyse the situation, you will see that the commission not only approves of the issuance of the 635,000 shares from the Treasury of the Union Associated, but also approves of the transaction as far as the Plymouth Oil Company is concerned in the State of Utah.

“Apparently the Los Angeles brokers have been placing some bids for the stock. The market jumped to $2\frac{1}{2}\phi$ today, and there seems to be considerable scramble for stock. Brokers are writing all stockholders that they have ever done business with. The local market seems to be cleaned up entirely and a bid of 4ϕ might not bring out very much stock. But if any of the brokers should get in contact with some of the out-of-State stockholders they may be able to secure stock at a much lesser price, so I would advise them not to run the market up too rapidly.

“I expected to hear from you today acknowledging receipt of all the stock to be delivered to (Tr. 455) you. Please do so at your earliest convenience and when convenient please mail the 70,000 shares in certificates as follows:

3—10,000—Oscar Chytrus

1—5,000

1—10,000—John Clayton

1—5,000

5—1,000

2—5,000—J. H. Morgan

5—1,000

“Trusting to hear from you by return mail, I remain,

“Very truly yours,”

The next letter is on the stationery of the Plymouth Oil Company, dated October 1, 1938, from Mr. E. Byron Siens to Mr. J. H. Morgan.

“October 1, 1938.

“Mr. J. H. Morgan

“526 Utah Oil Bldg.

“Salt Lake City, Utah.

“Dear J. H.:

“I neglected to acknowledge receipt of the various certificates but I did wire you acknowledging (Tr. 456) the error of an over issue of one certificate and advised you to proceed with the letter since which time I have received all the certificates and turned same over to the brokers, for which I hold their receipt.

“I have given them instructions to issue the shares as mentioned in your letter with the exception of that to Mr. Clayton. It was my understanding, and, I think yours, that Mr. Clayton at this time is to receive ten thousand shares. The reason I think this, is because of the third paragraph in your letter to me of September 9th.

“Quote:

““As per the agreement with you I advised Mr. Clayton that you were willing to issue an additional 10,000 shares to him when a second deal is made for another well. In other words our understanding is as follows: For the work performed in acquiring the 200,000 shares of outstanding stock—10,000 shares was to be issued to Mr. Clayton and 15,000 shares to myself. For going on the Board of Directors and assisting in lining the company up,

Mr. Clayton was to receive an additional 10,000 shares to be delivered when a second deal is made and stock can be taken from the (Tr. 457) Treasury.'

"I think you will also recall getting a letter from me on the next day, September 10th, second paragraph of which reads: Quote.

" 'Now I want you boys to be satisfied and if either you or Mr. Clayton are in any way displeased with this arrangement, now is the time to let me know.'

"I had no complaint or response to this letter and naturally supposed that we had completed the deal. By the way Mr. Barclay now wants me to write the stockholders a letter which I think is O.K. as they have already received the company letter and he will ask you for the stockholder list and you may give it to him. He can't hurt us now & may help us a lot. He is handling the situation there to the satisfaction of Mr. Adkisson, therefore he is 100% with me.

"We will be doing something real now this coming week & if our stock is not 25¢ a share in less than 60 days I will be very disappointed.

"Sincerely,

"E. Byron Siens" (s)

Will you excuse me a moment, please, your Honor?
(Consultation.)

Mr. Manster: October 10, 1938, from John H. Morgan to (Tr.458) E. Byron Siens:

"Dear Mr. Siens:

"The auditor's work, in order to give a certified statement as to the present status of the outstanding stock, has taken longer than anyone expected. He has just completed his trial work sheet today and has promised me a completed sheet by Tuesday or Wednesday. I will have my secretary run off a copy for you immediately thereafter. The outstanding stock is a few thousand shares less than the amount submitted to us by Truman. Truman's statement was 747,000 and the trial sheet will show, I think, about 742,000.

"He is starting on the financial statement, and I will submit the rough draft to you (as per Mr. Bray's request) as soon as the rough draft is completed.

"I have received a number of calls in way of explanation of the Union Associated deal. I find that the response is much more favorable if it appears that the Union Associated acquired some California oil land and then made a deal with the Plymouth Oil Company for drilling. It sounds too much like a purely stock deal for the Plymouth to furnish the land and the drilling also. This is merely a thought that you may use or not as you see fit.

"It appears that Mr. Barclay is holding up his market letter waiting for the geological report on the (Tr. 459) seventy acres. It seems to me advisable to have that market report into the hands of the old stockholders at the earliest date possible. I know of nothing that would induce them to hold their stock more than a market letter from a reputable

broker. If there is anything I can do or if there are any suggestions that you may have, you may rest assured that I will drop everything else in order to hurry the matter along.

"Sincerely yours,"

Perhaps one more letter, Judge, and then we might close.

The Court: All right.

Mr. Manster: October 10, 1938, from John H. Morgan to Mr. Fred V. Gordon:

"Mr. Fred V. Gordon

"612 Subway Terminal Bldg.

"Los Angeles, California.

"Dear Mr. Gordon:

"Pursuant to our conversation at the airport, I am enclosing herewith a form of affidavit for Miss Dean to sign.

"I was not acquainted with the date or county in which Miss Dean was born, so I am leaving those spaces blank. You can either fill them in yourself or run off another copy of the affidavit. When completed (Tr. 460) mail same to U. S. Land Office. Evanston, Wyoming.

"When you were leaving for the plane the thought I had in mind was this: On the Union Associated deal it would appear better for the Union Associated to have acquired the oil land and then they could make an agreement with the Plymouth Oil Co. for development (at least as far as any newspaper publicity is concerned. Of course, I realise this could

not be set up before the Corporation Department or the S. E. C.)

"I hope you arrived home safely and your Texas deal is going through, but you know how anxious I have been on the Beacon Dome so please advise me if there is any possibility of your returning to Salt Lake within the next ten days.

"With kind personal regards to Schirm, Mr. Dodd, and yourself, I remain,

"Very truly yours." (Tr. 461)

At this point it was stipulated that there had been a listing with the Securities and Exchange Commission in 1936, prior to the date of a letter of October 10, 1938, last read (Tr. 462) [68]

(At this point the file of letters heretofore marked as Government Exhibit No. 16, for identification, were offered and received in evidence, and Mr. Cannon read from Exhibit "C" a letter dated September 22, 1938, addressed to the State Securities Commission, State Capitol, Salt Lake City, Utah, reading as follows:) (Tr. 468)

* * * * *

September 22, 1938

State Securities Commission
State Capitol
Salt Lake City, Utah

Attention: Mr. A. Ezra Gull

Dear Sir:

Confirming our recent conversation, I am submitting herewith a statement of the deal between the Union Associated Mines Company, (a Utah Corporation) and the Plymouth Oil Company.

The Union Associated Mines Company is a corporation of three million shares. There is approximately 740,000 shares issued and outstanding. The remainder is in the treasury of the Company. The Union Associated Mines Company has been dormant for the past 3½ years. The original promoter, Mr. S. A. Parry, having died at that time and nothing has been done with the Company since in the way of development.

The present deal is as follows:

In consideration of 635,000 shares of Treasury stock to be issued to the Plymouth Oil Company or his nominee, the Union Associated will received 50% of the gross production on that certain parcel of property and described as follows:

Southeast one (1) acre of Block 13, Tract 15, City of Torrance, County of Los Angeles, State of California.

and 25% interest in the oil and gas leases on the property described as follows:

Parcel I

Lots 4 to 14 inclusive, Block 14, Lots 19, 20, 21, 26, 27 and 31 to 48 inclusive, Block 14, of the Factory Center Tract.

Parcel II

All lots in Block 11 of Factory Center Tract.

Parcel III

Lots 1 to 22 inclusive, Block 2, Lots 25 to 48 inclusive, Block 2, of the Factory Center Tract.

A. Ezra Gull

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Parcel IV

Lots 3 to 22 inclusive, Block 7, Lots 27 to 46 inclusive, Block 7, of the Factory Center Tract.

Parcel V

Lots 6, 7 and 10 to 22 inclusive, Block 3, Lots 26, 27 and 30 to 35 inclusive, Block 3, Lots 37 to 40 inclusive, Block 3, and Lots 43 to 50 inclusive, Block 3, of the Factory Center Tract.

Parcel VI

Lots 1 to 14 inclusive, Block 4, Lots 19 to 32, inclusive, Block 5, Lots 8, 9 and 15 to 18 inclusive, Block 12, Lots 1, 2, 5, 6 and 11 to 16 inclusive, Block 13, Lots 25 to 34 inclusive, Block 13, of the Factory Center Tract.

Parcel VII

Lots 1 to 14 inclusive, Lots 19, 20 and 33 to 41 inclusive, Lots 48, 49, 50 and North 75 feet of Lots 26, 27, 28, 29, Block 6, Lots 42, 43, 24, 25, 21, 22 and 15 to 18 inclusive, Lots 44, 45, 46, 47, Block 6, of the Factory Center Tract.

Parcel VIII

Lots 3 to 22 inclusive, Lots 31 to 48 inclusive, Lots 23, 24, and one-quarter interest in Lots 25, 26, 27 and 28 in Block 10, of the Factory Center Tract.

Parcel IX

Lots 1 to 48 inclusive, Block 15, Factory Center Tract.

Parcel X

Lots 3 to 24 inclusive, Block 1, Lots 27 to 56 inclusive, Block 1, Lots 1 to 57 inclusive, Block 8, Lots 1 to 58 inclusive, Block 9, Lots 1 to 58, Block 16, of Factory Center Tract.

Parcel XI

Lots 9 and 10, Block 25 of Tract 1589, of Sheet #1 of Maps, as per book 21, pages 38 and 39 of Official Records of Los Angeles County.

A. Ezra Gull

8/22/38 Page

Parcel XII

Southeast one (1) acre of Block 13, Tract 15, City of Torrance, County of Los Angeles, State of California.

The old stockholders are not being assessed to develop these properties, but will participate on the benefits derived from the acquisition of the new properties.

The transaction has been worked out and consummated in the State of Utah as a single isolated transaction. The company is not asking to sell any stock other than the exchange of the above 635,000 shares for the properties hereinabove described.

Trusting this sets forth the details requested by you, I am

Very truly yours,

JHM:BE

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibits Nos. 166, 166-a, 166-b. In the Matter of Union Ass'd Mines Co. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

(And Mr. Cannon further read from Exhibit 6 in evidence, the minutes of the Union Associated Mines, a letter dated September 28, 1938, from the State of Utah Securities Commission, Salt Lake City, reading as follows:) (Tr. 471)

[Crest]	THE STATE OF UTAH	A. Ezra Gull
	Securities Commission	Director
	Salt Lake City	Heber Meeks
		Secretary
		Sept. 28, 1938

Judge J. H. Morgan,
Utah Oil Building,
Salt Lake City, Utah
Dear Judge Morgan:

Re: Union Associated Mines Co.
Plymouth Oil Company.

We acknowledge your letter of September 22nd, relative to subject companies.

After a careful analysis of the statements contained in your letter as to the proposed activities of the latter company, together with our conversation recently, it is the opinion of this Department that neither the Plymouth Oil Company nor Union Associated Mines Company, need register their securities in Utah, in order to exchange the block of stock set out, approximately 635,000 shares, for the properties which Union Associated Mines Company will receive.

Truly yours,

UTAH SECURITIES COMMISSION
A. Ezra Gull
Director

AEG:BG

(Mr. Cannon also read from Plaintiff's Exhibit 14, a letter dated October 13, 1938, addressed to J. H. Morgan, reading as follows:) (Tr. 472)

LOSCAL PETROLEUM COMPANY

612 Subway Terminal Building
Los Angeles, Calif.

October 13th, 1938.

J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah.

Dear Judge.

Mr. Gordon has turned your letter of the 10th instant to the writer to answer as regards the data requested for Miss Dean. This Fred will have Miss Dean supply. Same will be mailed to the U. S. Land Office, Evanston, Wyoming.

Your thoughts as regards the Union Associated acquiring oil lands and leases under its own name is being taken under advisement by Gordon, Siens and the same will be discussed with you by *Atkission*, who plans on making a trip to Salt Lake very shortly. He is trying to have Fred join him in making the trip.

Fred arrived in Los Angeles safely, but acquired a very bad cold, his voice having left the body, but guess that a few days of the balmy sunny California weather will again find him in shape.

The Plymouth Oil has completed erecting the derrick on the Union Associated number one well in the Torrence field, and has application pending with the oil and gas division of the mining bureau for a drilling permit. This location will give the Union a sure oil well for their first venture, as the location was acquired by the writer

for the company. After the first well is completed, I look for easy going for the Union Associated and with you looking after the affairs of the company in Salt Lake and Gordon and his associates here we should have a very good dividend paying company before very long.

I will have a photo of the derrick taken for your office showing the Union Associated number one well.

Will advise you within few days of additional activity of the Union.

Had letter from Vrang this morning written from Farmington, New Mexico and he asked how we were coming on the Union.

With best regards to yourself.

Sincerely yours,

Chris Schirm

Chris Schirm

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 123. In the Matter of Union Assoc. Date 11/25/40. Witness Schirm. Electreporter, Inc., Official Reporters. By Harvey.

[69]

By stipulation, copies of the following documents were offered and received in evidence, with exhibit numbers as indicated:

Plaintiff's Exhibit No. 22, contract between Plymouth Oil Company and Union Associated Mines Company, dated September 21, 1938, signed by Plymouth Oil Company, Incorporated, by Sidney Fischgrund, vice-president, and Guy B. Davis, secretary and treasurer, first party; and Union Associated Mines Company, Incorporated, by John Clayton and by J. H. Morgan, second party.

[PLAINTIFF'S EXHIBIT NO. 22]

AGREEMENT

This Agreement, Made and entered into this 21 day of September, 1938, by and between the Plymouth Oil Company, a California Corporation, hereinafter designated First Party, and the Union Associated Mines Company, a Utah Corporation, hereinafter designated Second Party.

Witnesseth:

Whereas, First Party has acquired oil and gas leases on certain property in Los Angeles County, more particularly set forth in the Description of Property marked Exhibit "A", and by this reference made a part hereof;

Whereas, Second Party desires to acquire an interest in the oil and gas leases owned by the First Party and desires to share in the production of oil and petroleum products that may be obtained from said property;

Now, Therefore, for and in consideration of the premises and of the mutual covenants and agreements of the parties hereto, and other good and valuable considerations, receipt whereof is hereby acknowledged, First Party hereby assigns, conveys and transfers to the Second Party a one-half ($\frac{1}{2}$) or fifty (50%) per cent of the gross production from that certain oil and gas lease and agreement acquired by the First Party on that certain parcel of property more particularly set forth as Parcel XII in the description marked Exhibit "A", and by this reference made a part hereof, and First Party hereby assigns, conveys and transfers to the Second Party, a one-fourth ($\frac{1}{4}$) or twenty-five (25%) per cent of its interest in those certain oil and gas leases and agreements acquired by First Party

(Plaintiff's Exhibit No. 22)

on those certain parcels of property, more particularly set forth as Parcels I to XI inclusive in the description marked Exhibit "A", and by this reference made a part hereof, upon the following terms, covenants, conditions and provisions:

(1) First Party agrees to drill an oil well in what is known as the Torrance Oil Field in the County of Los Angeles, State of California, or on the property set forth as Parcel XII of the description marked Exhibit "A", which said real property is in the said Torrance Oil Field in the County of Los Angeles, State of California, and agrees to complete an oil well to the producing or oil bearing sands, or to a depth of approximately five thousand (5000) feet.

(2) First Party agrees that the costs, expenses and disbursements for drilling the oil well in said Torrance Oil Field shall be assumed, paid and incurred entirely by said First Party, and the Second Party shall be under no obligation to repay or reimburse the First Party for the costs, expenses and disbursements made for drilling said well.

(3) The First Party, and its employees, agents and contractors, will be in complete charge of drilling operations on said property, and the sale of oil from said well.

(4) That as consideration for the assignment, conveyance and transfer by First Party to Second Party of one-half ($\frac{1}{2}$) or fifty (50%) per cent of the gross produc-

(Plaintiff's Exhibit No. 22)

tion obtained from the property herein described as Parcel XII, and of a one-fourth ($\frac{1}{4}$) or twenty-five (25%) per cent of its interest in the oil and gas leases on the property herein described as Parcels I to XI inclusive, and as consideration for the agreement on the part of First Party to drill an oil well in the Torrance Field or on said Parcel XII herein described, Second Party transfers, conveys, sells, assigns, indorses and delivers unto First Party, six hundred thirty-five thousand (\$635,000) shares of its capital stock.

(5) It is understood that this agreement between the parties hereto is subject to all of the terms, conditions, provisions, obligations, payments, royalties, rights and duties that are to be performed and as are contained in the oil and gas leases, agreements and assignments under and by virtue of which the First Party has acquired said oil and gas leases.

(6) First Party agrees to commence drilling operations in the Torrance Field or on Parcel XII of the herein described property within thirty (30) days from and after the date this agreement is signed, executed and delivered by the parties hereto and agrees to continue drilling operations with due diligence and efficiency until a depth of five thousand (5000) feet has been reached, unless petroleum is discovered in paying quantities at a lesser depth; however, it is understood that First Party makes no warranty, representation or guarantee that oil or petroleum products can or will be produced, it being understood that

(Plaintiff's Exhibit No. 22)

the drilling of an oil well is speculative and that no part of this agreement is contingent upon the actual production of oil or petroleum products by the First Party.

(7) First Party shall be under no obligation to the Second Party, as a result of this agreement to drill oil wells on any of the other parcels of property herein described.

(8) It is expressly understood that all of the terms, covenants, provisions and conditions herein contained and which are contained in the oil and gas leases and agreements herein referred to are of the essence of this agreement and shall be binding upon and inure to the benefit of all the successors, and assigns of the parties hereto.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals on the day and year first above written.

PLYMOUTH OIL COMPANY,

a Corporation,

By Sidney Fischgrund

(Seal)

Vice-President

By Guy W Davis

Secretary and Treasurer

First Party.

UNION ASSOCIATED MINES COMPANY,

a Corporation

By John Clayton

By J H Morgan

(Seal)

Second Party.

(Plaintiff's Exhibit No. 22)

EXHIBIT "A"

DESCRIPTION OF PROPERTY

Parcel I

Lots 4 to 14 inclusive, Block 14, Lots 19, 20, 21, 26, 27 and 31 to 48 inclusive, Block 14, of the Factory Center Tract.

Parcel II

All lots in Block 11, of Factory Center Tract.

Parcel III

Lots 1 to 22 inclusive, Block 2, Lots 25 to 48 inclusive, Block 2, of the Factory Center Tract.

Parcel IV

Lots 3 to 22 inclusive, Block 7, Lots 27 to 46 inclusive, Block 7, of the Factory Center Tract.

Parcel V

Lots 6, 7 and 10 to 22 inclusive, Block 3, Lots 26, 27 and 30 to 35 inclusive, Block 3, Lots 37 to 40 inclusive, Block 3, and Lots 43 to 50 inclusive, Block 3, of the Factory Center Tract.

Parcel VI

Lots 1 to 14 inclusive, Block 4, Lots 19 to 32 inclusive, Block 5, Lots 8, 9 and 15 to 18 inclusive, Block 12, Lots 1, 2, 5, 6 and 11 to 16 inclusive, Block 13, Lots 25 to 34 inclusive, Block 13, of the Factory Center Tract.

Parcel VII

Lots 1 to 14 inclusive, Lots 19, 20 and 33 to 41 inclusive, Lots 48, 49, 50 and North 75 feet of Lots 26, 27, 28, 29, Block 6, Lots 42, 43, 24, 25, 21, 22 and 15 to 18 inclusive, Lots 44, 45, 46, 47 Block 6 of the Factory Center Tract.

(Plaintiff's Exhibit No. 22)

Parcel VIII

Lots 3 to 22 inclusive, Lots 31 to 48 inclusive, Lots 23, 24, and one-quarter interest in Lots 25, 26, 27 and 28 in Block 10, of the Factory Center Tract.

Parcel IX

Lots 1 to 48 inclusive, Block 15, Factory Center Tract.

Parcel X

Lots 3 to 24 inclusive, Block 1, Lots 27 to 56 inclusive, Block 1, Lots 1 to 57 inclusive, Block 8, Lots 1 to 58 inclusive, Block 9, Lots 1 to 58, Block 16, of Factory Center Tract.

Parcel XI

Lots 9 and 10, Block 25 of Tract 1589, of Sheet #1 of Maps, as per book 21, pages 38 and 39 of Official Records of Los Angeles County.

Parcel XII

Southeast one (1) acre of Block 13, Tract 15, City of Torrance, County of Los Angeles, State of California.

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibits Nos. 133, 133-A, 133-B, 133-C, 133-D, 133-E. In the Matter of Union Associated Mines. Date 12-17-40. Witness Fischgrund. Electreporter, Inc., Official Reporters; by Morris.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 22 in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

Plaintiff's Exhibit No. 23, contract and addenda between Plymouth Oil Company and Union Associated Mines Company, dated January 5, 1939, signed by Plymouth Oil Company, Incorporated, by Sidney Fischgrund, vice-president, and Guy B. Davis, secretary and treasurer, first party; and Union Associated Mines Company, Incorporated, by R. R. Bray and J. H. Morgan, officers for the second party.

[PLAINTIFF'S EXHIBIT NO. 23]

AGREEMENT

This Agreement, Made and entered into this 5th day of January, 1939, by and between the Plymouth Oil Company, a California corporation, hereinafter designated First Party, and the Union Associated Mines Company, a Utah corporation, hereinafter designated Second Party.

Witnesseth:

Whereas, First Party has erected an oil well derrick and proposes to drill an oil well on certain property in the City of Torrance, County of Los Angeles, State of California, more particularly described as Lot 23, Tract 437, under and pursuant to a certain oil and gas lease executed by the owners of the above described property as Lessor, and the Plymouth Oil Company as Lessee;

Whereas, Second Party desires to acquire an interest and share in the production of the oil and petroleum products that may be obtained from said property;

Now, Therefore, for and in consideration of the premises and the mutual covenants of the parties hereto, and other goods and valuable consideration, receipt whereof is hereby acknowledged, First Party hereby assigns unto Second Party, one-half of its right, title and interest in

(Plaintiff's Exhibit No. 23)

and to that certain oil and gas lease on the property described as Lot 23, Tract 437, City of Torrance, County of Los Angeles, State of California, which said one-half interest more particularly equals forty (40%) per cent of the gross production obtained from the said property, and as consideration therefor, Second Party hereby transfers, conveys, sells, assigns, endorses and delivers unto First Party six hundred thirty-five thousand (635,000) shares of its capital stock, upon the following terms, covenants, conditions and provisions:

(1) First Party agrees to drill an oil well on the hereinabove described property in the City of Torrance, County of Los Angeles, State of California, and agrees to complete the well to the producing or oil bearing sands or to a depth of fifty-one hundred (5100) feet.

(2) It is understood that First Party's interest in and to the oil produced from the above described land is a four-fifths ($\frac{4}{5}$) royalty or eighty (80%) per cent interest, and by this agreement one-half ($\frac{1}{2}$) of said royalty or interest is assigned over and unto Second Party, so that each party hereto will share equally in the production obtained from said property after the landowners receive the twenty (20%) per cent royalty provided in said oil and gas lease; however, it is understood and agreed that the forty (40%) per cent royalty so assigned to Second Party is not due or payable and is not to be paid until after all costs and expenses of drilling said oil well and all expenses incidental thereto, including costs of equipment, machinery, material and salaries have been paid from the four-fifths ($\frac{4}{5}$) royalty or eighty (80%) per cent of the first production obtained and received from said well. It is understood and agreed that the cost of

(Plaintiff's Exhibit No. 23)

said oil well is not to exceed Thirty Seven Thousand, Five Hundred (\$37,500.00) Dollars, and in the event the costs exceed said amount such excess shall be paid by the First Party.

(3) First Party, its employees, agents and contractors will be in complete charge of drilling operations on said property, and the sale of oil from said well.

(4) It is understood that this agreement is subject to all of the terms, conditions, provisions, obligations, payments, royalties, rights and duties that are to be performed, and the conditions imposed upon the First Party, as are more particularly contained in the oil and gas lease, option and agreement under and by virtue of which Second Party is to drill said oil well on said property.

(5) First Party has already erected a derrick on the hereinabove described property and agrees to commence drilling operations within thirty (30) days from the date this agreement is signed, executed and delivered by the parties hereto and agrees to continue drilling operations with due diligence and efficiency until a depth of fifty-one hundred (5100) feet has been reached, unless oil is discovered in paying quantities at a lesser depth; however, it is understood that First Party makes no warranty, representation or guarantee that oil or petroleum products will be produced, since the production of oil is speculative and therefore, this agreement is not contingent upon the actual production of oil or petroleum products by First Party.

(6) First Party will be under no obligation to drill more than one oil well on the herein described property.

(Plaintiff's Exhibit No. 23)

(7) That as consideration for the execution of this agreement by First Party, Second Party does hereby and herewith convey, sell, assign, endorse and deliver unto First Party six hundred thirty-five thousand (635,000) shares of its capital stock,

(8) It is expressly understood that all of the terms, covenants, provisions and conditions herein contained, and which are contained in the oil and gas lease and option agreement herein referred to are of the essence of this agreement and shall be binding upon and inure to the benefit of all the successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals on the day and year first above written.

PLYMOUTH OIL COMPANY,

a Corporation

By Sidney Fischgrund

(Seal)

Vice-President

By Guy W. Davis

Secretary-Treasurer

First Party

UNION ASSOCIATED MINES COMPANY,

a Corporation

By R. R. Bray

By J. H. Morgan

(Seal)

Secy

Second Party

(Plaintiff's Exhibit No. 23)

ADDENDA

Whereas, an agreement has been entered into by and between Plymouth Oil Company, a California corporation, designated First Party, and Union Associated Mines Company, a Utah corporation, designated Second Party, which said agreement is dated January 5th, 1939;

And, Whereas, it is the intention of the parties to amend and supplement said agreement;

Now, Therefore, they do hereby amend and supplement said agreement to provide as follows, to-wit:

7-A. It is expressly understood and agreed by and between the parties hereto that the 635,000 shares of the capital stock of the Union Associated Mines Company sold, assigned and transferred to the Plymouth Oil Company shall be delivered to the said Plymouth Oil Company in seven installments when the work done on the drilling of Plymouth Oil Company-Union Associated Mines Company Well #2 progresses as follows:

100,000 shares upon completion of derrick;

100,000 shares when oil well is spudded in;

100,000 shares when well is drilled to a depth of
1000 feet;

100,000 shares when well is drilled to a depth of
2000 feet;

100,000 shares when well is drilled to a depth of
3000 feet;

100,000 shares when well is drilled to a depth of
4000 feet;

35,000 shares when well is drilled to a depth of
5000 feet.

(Plaintiff's Exhibit No. 23)

7-B. It is further understood and agreed by and between the parties hereto that the 635,000 shares of capital stock of the Union Associated Mines Company is to be delivered under the terms of this agreement and shall be ex-dividend #1, and that the delivery of said stock shall be subject to arrangements to be made for the delivery of the first dividend on or before March 25th, 1939.

Approved

PLYMOUTH OIL COMPANY

By.....

By.....

First Party

Approved

UNION ASSOCIATED MINES COMPANY

By.....

By.....

Second Party

Salt Lake City, Utah

September 3, 1938

Received of Walker Bank & Trust Company one hundred seventy thousand shares of Union Associated Mines Company stock as follows:

Certificate No.	No. Shares
3177	1000
3164	1000
916	1000
3167	1000

(Plaintiff's Exhibit No. 23)

2290	5800
2301	10,000
173	41,119
2302	2760
2305	3000
3172	10,000
3163	11,000
2304	7500
2303	7500
2330	20,000
3178	1000
3170	14,664
3169	10,000
3175	3000
3171	18,690

170,033

J. H. Morgan

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibits Nos. 132, 132-A, 132-B, 132-C. In the Matter of Union Associated Mines. Date 12-17-40. Witness Fischgrund. Electreporter, Inc., Official Reporters; by Morris.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 23 in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Tr. 476)

Plaintiff's Exhibit No. 24, a copy of an oil and gas lease, dated December 29, 1938, executed by F. V. Gordon and Mary L. Gordon, lessors, and William S. Millener, of Alpine Tavern, Alpine, California, lessee.

[PLAINTIFF'S EXHIBIT NO. 24]

OIL AND GAS LEASE

Parties

This Lease, dated December 29, 1938, executed by F. V. Gordon and Mary L. Gordon, husband and wife, Rhetta Worthing Warsap and Leo Harry Warsap, her husband, (the interest of Rhetta Worthing Warsap, however, being her *sold* and separate property) George W. Jones and Gladys Z. Jones, husband and wife, and Artie M. Chapin, a widow, first parties, herein called lessors, and William S. Millener of Alpine Tavern, Alpine California, second party, herein called lessee,

Witnesseth:

Consideration

1. In consideration of the agreements hereinafter contained, and for other valuable consideration, the lessors lease and demise to the lessee the sole and exclusive right of drilling for, developing and removing petroleum, gas and other hydrocarbon substances in or on that certain land located in the County of Kern, State of California, and described as follows, to-wit:

The land

Northeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ Section 2.
Township 25 South Range 18 East M. D. B. & M.

(Plaintiff's Exhibit No. 24)

Roads, etc.

with the right to construct and maintain thereon the necessary roads, (which will not exceed fifteen feet in width,) rights of way for pipe lines for oil, gas and water, the buildings machinery, equipment, telephone lines and telegraph lines necessary for carrying on said business of extracting and producing any of said products, and the right to use without charge, for lessee's operations on said land, all water developed by the lessee.

Surface rights

2. Lessors reserve the right to continue the use of the surface of said land for agricultural purposes and maintain any dwelling house or other buildings thereon in so far as such use or occupancy will not materially interfere with lessee's rights and operations hereunder, and lessee in its operations shall interfere as little as practicable with such use by lessors. This lease is made subject to a surface lease for grazing of livestock including the use of the irrigation ditches, and to any renewals or extensions of said lease.

Term—20

years etc.

3. The term of this lease shall be twenty (20) years from date hereof, and as long thereafter as oil, gas or other hydrocarbons are produced in paying quantities thereon, unless sooner terminated as hereinafter provided.

Drilling

4. The *frilling* requirements for this lease shall be as follows:

(Plaintiff's Exhibit No. 24)

First well

- (a) On or before three (3) years, lessee must commence drilling operations on said land, and must diligently prosecute the same without interruption, unless delay is excused as hereinafter provided, to a depth of 5000 feet, unless oil and/or gas is found in paying quantities at a lesser depth, or, in lessee's judgment, further drilling becomes unprofitable.

Abandonment

- (b) Should further drilling of a hole drilled hereunder become impossible by reason of accident, or unprofitable in the judgment of the lessee, that hole may be abandoned.

Further wells

- (c) Within ninety (90) days of the completion or abandonment as aforesaid, lessee must commence drilling operations for a new well and prosecute the same to completion or abandonment in the same manner provided herein for the first well, and so on with each succeeding well, until there shall have been drilled on said land the equivalent of one producing well to each (10) acres thereof. Lessee may drill thereon as many more wells as lessee may elect, but no new well shall be drilled by lessee after twenty (20) years from date hereof.

(Plaintiff's Exhibit No. 24)

**Surrender and
Cancellation**

- (d) Lessee may surrender this lease before or after the commencement of drilling without liability for failure to commence or continue operations and upon such surrender lessee shall promptly record its quitclaim deed for said premises and pay to lessors the sum of five dollars (\$5.00) Cancellation and termination of lease shall be the only remedy for failure to commence or continue operations.

**Offset—one-
half mile**

- (e) Should oil be discovered in paying quantities (for the purpose of this paragraph deemed to be one hundred fifty barrels per day on an average for a thirty day test) within one-half mile from the leased premises, then lessee shall within sixty (60) days after said (30) day test period commence drilling operations upon the land hereby leased and prosecute the same as hereinafter provided.

Offset wells

- (f) Within ninety (90) days after a producing well not already offset on lessors' premises is placed upon production within three hundred (300) feet of the leased premises, lessee shall commence drilling operations for an offset well on the leased land and diligently prosecute the drilling thereof in the manner above provided for

(Plaintiff's Exhibit No. 24)

the first well; but this shall not obligate lessee to operate more than one string of tools at any one time; and if the time for commencement of an offset well should occur while lessee is drilling elsewhere on said land, lessee shall commence the drilling of said offset well within thirty (30) days after the completion of such other well.

Surrender and
retaining of
producing wells

5. Lessee shall have the right at any time to retain any well or wells drilled hereunder, together with three (3) acres surrounding each such well, in the form of a square, as nearly as possible, with the well in the center thereof, subject to the provisions of this lease, upon surrendering the remainder of such land and executing and recording to lessors a quitclaim deed for the land so surrendered. Lessors will not drill or cause or permit to be drilled upon land so surrendered within one hundred fifty (150) feet of any such well retained by lessee.

Comply with
laws.

6. Lessee will comply with all laws of the state of California and regulations thereunder in lessee's drilling upon said land; and lessee shall have the right, but shall not be obligated so to do, to enter into conservation or curtailment agreements with other operators for the purpose of preventing waste or for the conservation of oil and gas when such agreements are required or permitted

(Plaintiff's Exhibit No. 24)

by state or federal statutes or officials; provided, however, that lessee shall not curtail any of the wells drilled upon the leased premises unless all offsetting operators likewise curtail and such curtailment shall be at no greater pro rate percentage per well than the curtailment effective as to said offset wells of operators on properties adjoining the leased premises.

Bury pipe

lines

Sumps and

ditches, etc.

7. Lessee will bury all pipe lines eighteen (18) inches where same cross cultivated lands, when requested so to do. Upon abandonment of any well, the well and all damage from sumps and ditches will be repaired by lessee within sixty (60) days or an appropriate cash damage paid. Like repairs will be made upon expiration or termination of this lease, or an appropriate cash damage paid.

“Paying

Quantities”

8. As used herein with reference to drilling operations, the term “paying quantities” means that quantity and of such quality that an ordinarily prudent person, experienced in the business of oil, or oil and gas production, considering all the surrounding conditions, would expect a reasonable profit above the entire cost of drilling, equipping and operation the producing well or wells completed. As used herein with reference to lessee's right to retain and operate a completed well, the term “paying quantities” means oil, or oil and gas together, in such

(Plaintiff's Exhibit No. 24)

quantity and of such quality as will pay lessee a small profit over the cost of operating the well, although the cost of drilling and equipping the well never may be paid. Where the term "paying quantities" has been used above with reference to discovery upon land within one-half mile of the leased premises, the parties have agreed that one hundred fifty (150) barrels shall be a discovery of oil in paying quantities and such provision shall control the definitions contained in this paragraph.

Operating wells

9. Producing wells are to be operated by lessee at lessee's own expense as long as such producing wells produce in paying quantities as above defined unless operation is excused as herein elsewhere provided.

Free oil and

gas.

Water

10. Lessee shall not be required to pay royalty on oil or gas produced and used by lessee on said premises for operations hereunder, but may use such oil or gas free of charge. If and while the same is not required by lessee, lessors may use without charge gas produced from said land for lessors' domestic use on the land, at lessors' risk. No charge will be made to lessee for water developed by lessee on this land, and used hereon for its necessary operations on this land.

Royalty

11. Other than the oil and gas specified in paragraph 10 hereof, lessors reserve the following as part of the consideration for this contract and as royalty:

(Plaintiff's Exhibit No. 24)

Oil
in kind or
money.

- (a) One-sixth (1/6th) of all oil produced and saved from said premises by lessee, which lessors shall receive, in money or in kind at lessors' option, as hereinafter provided. Royalty in kind shall be delivered in tanks maintained on the property for that purpose by lessee, and shall be stored for not exceeding thirty (30) days, at lessors' risk. If the royalty is paid in money, then lessee shall pay lessors one-sixth (1/6th) of the posted market price at the well of all such oil at time of production, less actual cost of cleaning, treating and for dehydrating, if any, not exceeding five cents (5¢) per barrel of net clean oil, cutting 50% or less, and seven and one-half cents (7½¢) per barrel for oil cutting over 50%. The option of lessors' to take royalty in money or in kind shall be only exercised once every ninety (90) days and then on ten (10) days notice in writing to lessee; if no notice is given, royalties are payable in money.

"Market price",
testing, etc.

- (b) Royalty in oil, when payable in cash, shall be based on the net quantity after deduction for water and other foreign substances, as determined by a reasonably accurate test, and on gravity of the oil as determined by such test, save that where the oil contains in excess of 3%

(Plaintiff's Exhibit No. 24)

water or other foreign substances the gravity shall be corrected to 3% cut. In the absence of a posted price in the field lessee shall monthly make to lessors a written offer of lessors' royalty share of oil production during the calendar month, which shall not be less than the price currently offered by lessee to other lessors' or to producers for oil of like quality and gravity in the same field and lessors shall have the option to accept or reject such offer within five (5) days thereafter. Unless written rejection is delivered to lessee within said period said offer shall for all purposes be deemed accepted. If rejected, then lessee shall store lessors' royalty oil in lessee's storage tanks, at lessors' risk for not to exceed thirty (30) days from the date of such written rejection.

Gas

- (c) For all gas produced, saved and sold from the leased land and casinghead gasoline extracted therefrom, lessors' royalty shall be one-sixth (1/6th) as hereinafter specified; but, excepting as expressly provided in this lease, lessee is not required to produce, sell or otherwise dispose of gas.

Casinghead gasoline

- (d) While the natural gas from said land is being processed for the recovery of gasoline therefrom in a plant now owned, operated or controlled by

(Plaintiff's Exhibit No. 24)

lessee, the royalty on account of such natural gas, the gasoline extracted therefrom, and the residual dry gas remaining after such extraction shall be based on the amount of money received by lessee from the owner or operator of such plant as consideration for said gas or the privilege of treating the same. If the consideration received from such third party shall consist in whole or in part of a share of the gasoline or residual dry gas resulting from such processing, the royalty, except as hereinafter provided, shall be based on the value (as hereinafter defined) of the products so received. If the contract or other arrangement of processing of such dry gas by such third party shall provide for a payment to be made to such third party as a charge for such processing, said payment shall be deducted from the proceeds or value of the products received from it as the result of such processing, the amount of such charge plus any additional costs incurred by lessee in accepting delivery at the plant or lease of the gasoline from such third party (excluding cost of pipeline or other equipment), and the royalty shall be computed on the amount remaining after such deduction. While the natural gas from said premises is being processed by lessee in a plant owned, operated or controlled by lessee there shall be deducted from the value of all gasoline extracted and saved from such natural gas sixty-five percent, (65%) of such value to compensate lessee for such processing and the remainder of such value,

(Plaintiff's Exhibit No. 24)

plus the value of the residual dry gas as herein-after defined, shall be the sum upon which royalty shall be computed.

Value of
gasoline

- (e) Whenever under this lease the value of gasoline enters into the computation of royalties, the royalties shall be computed upon the price received by lessee from the sale of gasoline extracted, saved and sold by lessee from said gas at plant or lease. Lessee shall have the right to sell and make contracts from future sales and deliveries of any and all gasoline extracted and saved by it from said gas, and if it does so sell or contract for sale of all or part thereof, the average price received by lessee at plant or lease for such gasoline during any month shall be the price for the basis of settlement hereunder for gasoline extracted, saved and sold during that month. At lessee's option, lessee may purchase all or any part of said manufactured gasoline, in which event lessee shall pay lessors the royalty percentage required by this lease at the average market value per gallon at the plant or lease during the respective calendar month.

Accounting
for dry gas

- (f) Whenever and after the gas taken hereunder by lessee has been treated for the extraction of gasoline, lessee shall have the right to use free

(Plaintiff's Exhibit No. 24)

of charge a fair proportionate quantity of the resultant dry gas as may be needed in the proper operation of its plant or plants wherein said gas is treated, but the total quantity of gas so used by lessee, together with losses and shrinkage due to extraction of gasoline, shall be deducted from the gas taken by lessee from all parties in direct proportion of the respective amounts taken from each and treated in said plant or plants. Such dry gas shall be deducted before pro rating the dry gas sold as hereinafter provided.

Dry gas, ctd.

- (g) Whenever the value of residual dry gas enters into the computation of royalties under this lease such value shall be computed at a rate per thousand cubic feet at which residual dry gas is sold by lessee at the plant at which the said gas from said leased premises is processed, during the month involved in the settlement. No royalty shall be paid on account of any residual dry gas returned to said leased premises and used by lessee in a necessary and economical manner in its operations or lost or wasted to air.

No other charges

- (h) No charge shall be made against or deduction made from, or royalties paid for, cost of extracting gasoline or dehydrating or treating oil except as herein provided.

(Plaintiff's Exhibit No. 24)

Books, records, logs

- (i) The royalty in money as aforesaid shall be ascertained, computed and paid monthly, and for this purpose lessee shall keep true and correct books of account showing the production of said substances from said premises, which records shall be open to inspection of lessors at all reasonable times. Lessee shall furnish to lessors monthly written statements of the production of said premises for the preceding calendar month; settlement thereof shall be made between the parties hereto on the twentieth (20th) day of each calendar month. Lessors shall have the right to examine at all reasonable times the land hereby leased, work in progress and done thereon, and production therefrom, equipment on said land and logs of all wells drilled by lessee on said land.

New or deep

zone

Drill or

surrender

12. In event that, after lessee has complied with its drilling requirements hereunder, oil and gas should be discovered in paying quantities within three hundred (300) feet of any boundary of the leased land, and such discovery should be from a separate and different zone or sand from which lessee then is producing from on the land hereby leased, lessee shall, within ninety (90) days after a thirty (30) day production test upon said well, commence and continue drilling operations in a bona fide

(Plaintiff's Exhibit No. 24)

effort to produce from said separate and different zone, and permitting a period of ninety (90) days between the completion of one such well and the drilling of another, lessee shall drill and complete one well to each twenty (20) acres if the gravity of the oil produced is thirty-four gravity or higher; otherwise one well to ten (10) acres. In lieu of drilling new wells to said new zone lessee shall have the right to deepen any well drilled upon the leased premises, providing the same is not producing or capable of producing oil in paying quantities as herein defined. Lessee shall have the same right to abandon any such well should further drilling thereof prove unprofitable or because of mechanical difficulties, in which event lessee shall commence a new well in lieu of such abandoned well within a period of ninety (90) days from the date of cessation of work upon such well. Should lessee fail to commence drilling operations for said deep or new well within the time provided in this paragraph, lessee shall forfeit its right to develop such new zone or sand and will quitclaim and surrender to lessors such portion of said lease as lessors or their subsequent lessees may require to properly develop said sand zone. In this event the parties hereto will have reciprocal rights of way and easements over the property of the other for convenience and operations, and each will interfere as little as possible with the operation of the other.

Strikes, etc.

13. Lessee's drilling, producing and other operations hereunder may be suspended if and while compliance is prevented by the elements, accidents, strikes, lockouts, riots, delays, in transportation, inability to secure mate-

(Plaintiff's Exhibit No. 24)

rials in the open market, interference by governmental action, or by *an* other cause, whether similar to the foregoing or not, beyond control of lessee. Drilling and producing operations for oil, or oil and gas together, may be suspended if and while the price offered to or obtainable by producers generally in the same field to less than sixty cents (60) per barre~~l~~ at the well, excepting when wells being offset or already offset are producing.

Taxes

14. The lessee shall pay before delinquent all taxes levied against the structures, equipment and other personal property placed, maintained or used by lessee on or in the leased land, and shall pay any increase in taxes assessed against the leased land, whether upon the land or upon the mineral rights; lessee shall pay before delinquent all other taxes assessed against lessors' interest in the leased land and any local improvement or street assessments. Any *addition* taxes, assessments or charges levied or assessed by governmental authority other than or in addition to those now in existence, on account of production from said property of any of the substances herein specified, shall be borne by lessee. Lessors may pay the entire amount of any tax or assessment which is a lien against the leased land or improvements thereon or therein and shall be entitled to reimbursement from the lessee, with interest at seven per cent, (7%) per annum from the date of demand for such reimbursement.

(Plaintiff's Exhibit No. 24)

Non-
responsibility

15. All work done by lessee hereunder shall be at lessee's sole cost, and lessee shall protect said land and lessors from claims of laborers, materialment and contractors, Lessors may post and maintain customary notices of non-responsibility for material and labor furnished for lessee's operations.

Right to move
machinery

16. Lessee shall have the right to remove from said land during the life of this lease and at any time within three (3) months after expiration or sooner termination thereof of all derricks, machinery, rigs, pumping stations, and all property and improvements belonging to or furnished by the lessee except casing which shall remain in the holes at the option of lessors to be exercised *with* thirty (30) day after the expiration or termination of this lease.

Termination

17. Time is of the essence of this lease. After thirty (30) days notice in writing from lessors to lessee to remedy any breach of this lease, specifying the nature thereof, and upon failure by lessee then to remedy such breach, lessors may terminate this lease without further notice; provided, only ten (10) days notice shall be required for failure to pay rent or royalty; and provided no such notice shall be required to terminate for breach of lessee's obligation relating to commencement of drilling operations for first well; and provided, the right to operate, repair, redrill, deepen and recomplete any well can

(Plaintiff's Exhibit No. 24)

only be terminated by breach of some requirement **directly** relating to, connected with or arising from the **operation** of such well, and failure to pay royalty on account of that well shall be breach of such requirement.

Should lessee default during the course of drilling its first well and this lease be terminated on account thereof, or should lessee voluntarily surrender or quitclaim this lease before discovery of oil in paying quantities, lessors shall have the right, notwithstanding anything herein to the contrary, to use all of lessee's equipment for the purpose of completing said well for a period of ninety (90) days without charge, after which time lessee shall have the right to remove the same.

Notices—

how given

Notices to lessee under this or any provision hereof may be given by personal service in writing, or by depositing written notice in United States registered mail, in California, postage prepaid, addressed to lessee at/or such address of which lessee may notify lessors.

Notice to lessors under this lease may be given by personal service in writing, or by depositing written notice in United States registered mail, in California, postage prepaid, addressed to

F. V. Gordon and Mary L. Gordon
612 Subway Terminal Building

Rhetta Worthing Warsap and Leo Harry Warsap,
756 South Spring Street,

George W. Jones and Gladys Z. Jones
Room 1115, 412 W. Sixth St.,

(Plaintiff's Exhibit No. 24)

and

Artie M. Chapin

555 No. Rossmore,

all in the city of Los Angeles, or at such other address of which lessors may notify lessee.

Time of notice shall run from time of such personal service or deposit, as case may be.

Warranty of title

18. Lessors covenant that they are the owners of said land free and clear of all encumbrances, except liens, charges and mortgages of record, and warrant to the lessee peaceable possession during the life of this lease, Lessors consent to the subordination to this lease of any mortgage or lien now upon the said land. Lessee, at lessee's option, may pay or discharge any taxes, mortgages, trust deeds, contracts or liens now upon the property, levied or assessed on or against said real property, now or hereafter, and, in event of exercise of said option, lessee shall be subrogated to the rights of any holder or holders thereof, and may reimburse itself by applying to discharge thereof any royalties or rents accruing hereunder.

Quitclaim deed

19. Upon expiration or sooner termination of this lease lessee will deliver to lessors a good and sufficient quitclaim deed for the land hereby leased and then retained by lessee.

(Plaintiff's Exhibit No. 24)

Where cash payments are to be made

20. The land hereby leased is *woned* in accordance with the following scheduel, and all payments of rental, cash royalty or other money to be paid lessors hereunder shall be deposited to the credit of said lessors at the Citizens National Trust & Savings Bank, 736 South Hill Street, Los Angeles, California, and lessors shall give said bank appropriate instructions for division of such income as follows:

4/12ths to F. V. Gordon and Mary L. Gordon;

3/12ths to Rhetta Worthing Warsap;

4/12ths to Artie M. Chapin; and

1/12th to George W. Jones and Gladys Z. Jones

21. Lessors agree that upon the payment of \$2500.00 at any time on or before three (3) years from date hereof, the drilling time as provided in Paragraph A. Article 4 above, may be extended an additional two (2) years.
Heirs, etc.

22. This lease shall bind and inure to the benefit of the parties hereto, their heirs, successors in interest and assigns, respectively, subject to restraint upon assignment and subletting as provided in the previous paragraph.
Marginal

23. The notations appearing at the left margin of this lease are for convenience only in referring to the lease, and form no part hereof.

(Plaintiff's Exhibit No. 24)

Executed in quadruplicate.

LEO HARRY WARSAP (Signed)

GEORGE W. JONES (Signed)

GLADYS Z. JONES (Signed)

F. V. GORDON (Signed)

MARY L. GORDON (Signed)

Rhett Worthing Warsap

ARTIE M. CHAPIN (Signed)

Lessors

WILLIAM S. MILLENER (Signed)

Lessee

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibits Nos. 135, 135-A, 135-B, 135-C, 135-D, 135-E, 135-F. In the Matter of Union Associated Mines. Date 12-18-40. Witness Fischgrund. Electreporter, Inc., Official Reporters; by Zellner.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 24 in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Tr. 477)

Mr. Cannon: I think we can stipulate, can we not, that copies of Exhibits 22—that is, the original contract between Plymouth and Union on No. 1 well, and also Exhibit 23, the contract between those same companies as to the No. 2 well, as well as the last document you have

just shown us, Exhibit 25, the lease from Millener to Union, were all part of the registration statement (Government's Exhibit No. 7), were they not?

Mr. Manster: Yes, that is true. (Tr. 480) [70]

(By stipulation except for the reservations hereafter mentioned, Plaintiff's Exhibit No. 25, an agreement dated January 17, 1939, between E. B. Siens and James H. Collins, was offered and received in evidence.)

Mr. Blue: Reserving, however, to the other defendants than Collins an objection on the ground that—we have no objection as to the foundation, but we do object on the ground that it is hearsay and incompetent to each and every one of them, and no proper foundation laid in connecting them up any way with the particular document.

The Court: An exception may be noted. (Tr. 481)

Plaintiff's Exhibit No. 25 was at this point read in evidence, and is as follows:

[PLAINTIFF'S EXHIBIT NO. 25]

AGREEMENT

This Agreement, made and entered into this 17th day of January, 1939, by and between E. B. Siens, herein designated First Party, and James H. Collins, of 229 South Tower Drive, Beverly Hills, California, herein designated Second Party.

Witnesseth:

Whereas, Second Party desires to purchase from First Party, shares of stock of the Union Associated Mines Company, a Corporation;

(Plaintiff's Exhibit No. 25)

Now, Therefore, First Party does hereby offer to sell and deliver to the Second Party, shares of stock of the Union Associated Mines Company, in such amounts, or number of shares, and at such price per share, on or before the dates specified in the schedule as follows, to-wit:

Amount or Number of Shares	Price Per Share	Date Prior to Which Stock Is to Be Purchased
83,333	.02½¢ per share	February 1st, 1939.
83,333	.03¢ “ “	March 1st, 1939.
83,333	.04¢ “ “	April 1st, 1939.
83,333	.05¢ “ “	May 1st, 1939.
83,333	.06¢ “ “	June 1st, 1939.
83,333	.08¢ “ “	July 1st, 1939.
83,333	.10¢ “ “	August 1st, 1939.
83,333	.12¢ “ “	September 1st, 1939.
83,333	.15¢ “ “	October 1st, 1939.
83,333	.20¢ “ “	November 1st, 1939.
83,333	.25¢ “ “	December 1st, 1939.
83,337	.30¢ “ “	January 1st, 1940.

(1) Second Party agrees to purchase from First Party, shares of stock of the Union Associated Mines Company, in such amounts or number of shares, and at the prices per share, on or before the dates hereinabove specified, and First Party agrees to deliver said stock to Second Party, or his designated agent, in such amounts or number of shares as he may purchase for the specified price on or before the dates above stated.

(2) Upon the execution of this agreement, Second Party agrees to purchase from First Party, twenty thou-

sand (20,000) shares of stock of the Union Associated Mines Company for the sum of Five Hundred (\$500.00) Dollars, and agrees to purchase 63,333 shares of stock at the agreed price of $.02\frac{1}{2}\text{¢}$ per share on or before the 1st day of February, 1939.

(3) Second Party agrees to purchase from First Party 33,333 shares of stock of the Union Associated Mines Company on or before the 1st of February, 1939, at the agreed price of $.03\text{¢}$ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of said second allotment, or 50,000 shares, at the agreed price of $.03\text{¢}$ on or before the 1st day of March, 1939.

(4) Second Party agrees to purchase from First Party 25,000 shares of stock of the Union Associated Mines Company on or before the 1st day of March, 1939, at the agreed price of $.04\text{¢}$ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of said third allotment, or 58,333 shares, at the agreed price of $.04\text{¢}$ per share on or before the 1st day of April, 1939.

(5) Second Party agrees to purchase from First Party 20,000 shares of stock of the Union Associated Mines Company on or before the 1st day of April, 1939, at the agreed price of $.05\text{¢}$ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of said fourth allotment, or 63,333 shares at the agreed price of $.05\text{¢}$ per share on or before the 1st day of May, 1939.

(6) Second Party agrees to purchase from First Party 13,333 shares of stock of the Union Associated Mines Company on or before the 1st day of May, 1939, at the agreed price of $.06\text{¢}$ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the

(Plaintiff's Exhibit No. 25)

fifth allotment, or 70,000 shares at the agreed price of .06¢ per share on or before the 1st day of June, 1939.

(7) Second Party agrees to purchase from First Party 12,500 shares of stock of the Union Associated Mines Company on or before the 1st day of June, 1939, at the agreed price of .08¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the sixth allotment, or 70,833 shares, at the agreed price of .08¢ per share on or before the 1st day of July, 1939.

(8) Second Party agrees to purchase from First Party 10,000 shares of stock of the Union Associated Mines Company on or before the 1st day of July, 1939, at the agreed price of .10¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the seventh allotment, or 73,333 shares, at the agreed price of .10¢ per share on or before the 1st day of August, 1939.

(9) Second Party agrees to purchase from First Party 8,333 shares of stock of the Union Associated Mines Company on or before the 1st day of August, 1939, at the agreed price of .12¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the eighth allotment, or 75,000 shares, at the agreed price of .12¢ per share on or before the 1st day of September, 1939.

(10) Second Party agrees to purchase from First Party 6,666 shares of stock of the Union Associated Mines Company on or before the 1st day of September, 1939, at the agreed price of .15¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the ninth allotment, or 76,667 shares, at the agreed price of .15¢ per share on or before the 1st day of October, 1939.

(Plaintiff's Exhibit No. 25)

(11) Second Party agrees to purchase from First Party 5,000 shares of stock of the Union Associated Mines Company on or before the 1st day of October, 1939, at the agreed price of .20¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the tenth allotment, or 78,333 shares, at the agreed price of .20¢ per share on or before the 1st day of November, 1939.

(12) Second Party agrees to purchase from First Party 4,000 shares of stock of the Union Associated Mines Company on or before the 1st day of November, 1939, at the agreed price of .25¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the eleventh allotment, or 79,333 shares, at the agreed price of .25¢ per share on or before the 1st day of December, 1939.

(13) Second Party agrees to purchase from First Party 3,333 shares of stock of the Union Associated Mines Company on or before the 1st day of December, 1939, at the agreed price of .30¢ per share, or One Thousand (\$1,000.00) Dollars, and purchase the balance of the twelfth allotment, or 80,004 shares, at the agreed price of .30¢ per share on or before the 1st day of January, 1940.

(14) It is agreed that the above shares may be purchased on or before the dates hereinabove designated at the prices herein set forth.

(15) It is distinctly understood and agreed that time of payment is of the essence of this agreement, and should Second Party fail to make payment and purchase the shares of stock as hereinabove set forth on or before

(Plaintiff's Exhibit No. 25)

the specified dates, and at the designated prices, the First Party may terminate this agreement, and thereupon, First Party shall be under no further obligations or liability whatsoever under this agreement.

(16) It is the intention of the parties hereto that upon the execution of this agreement, Second Party will purchase as many shares of stock of the Union Associated Mines Company as Five Hundred (\$500.00) Dollars will purchase according to the schedule under the first allotment, and on the 1st day of February, 1939, and on the first day of each and every month thereafter, Second Party will purchase from First Party as many shares of stock as One Thousand (\$1,000.00) Dollars will purchase under the schedule as set forth herein, and as is more particularly set forth in Paragraphs 2 to 14 herein; receipt of the sum of Five Hundred (\$500.00) Dollars, for the purchase of the first 20,000 shares of stock, is hereby acknowledged by Second Party.

In Witness Whereof, the parties hereto have hereunto set their hands and official seal on the day and year first above written.

(S) E. BYRON SIENS
FIRST PARTY

SECOND PARTY

February 28th, 1939.

Received from Fran L. Tucker check for \$1,650.00 on Collins Contract for which I have delivered 55000 shares Union Associated stock.

(S) E. BYRON SIENS.

(Plaintiff's Exhibit No. 25)

Los Angeles, California,
March First, 1939.

It is hereby mutually agreed and understood by and between E. B. Siens and James H. Collins, that upon the payment of the sum of Twenty two Hundred and Seven and 94/100 (\$2,207.94) Dollars by James H. Collins to E. B. Siens on or before 12:00 o'clock "noon" of March Second, 1939, E. B. Siens will deliver to James H. Collins, Fifty-three thousand three hundred thirty-three (53,333) shares of stock in the Union Associated Mines Company, a Utah Corporation; and it is distinctly understood that thereby the Agreement heretofore entered into by and between the parties will continue in full force and effect, but should the said sum of money not be paid by James H. Collins on or before "Noon" of March 2nd, 1939, then the contract between the parties will be terminated; time is expressly made of the essence of this agreement.

(S) E. BYRON SIENS.

(S) JAMES H. COLLINS

Received from James Collins the \$2,207.94 above mentioned which is the fulfillment of his contract.

(S) E. BYRON SIENS.

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibits Nos. 127, 127-A, 128-B, 127-C, 127-D, 127-E, 127-F. In the Matter of Union Assd. Mines. Date 12-3-40. Witness James Collins. Electreporter, Inc., Official Reporters; by Morris.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 25 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

Mr. Cannon: Will you not stipulate with me, too, Mr. Manster, that this copy of the contract which has been introduced in evidence was voluntarily delivered by Mr. Collins—

Mr. Manster: That is correct.

Mr. Cannon: —to Mr. Burr of the local S. E. C. office in early April, 1939?

Mr. Manster: Precisely. (Tr. 487)

(The group of letters heretofore marked Plaintiff's Exhibit No. 15 for identification, was received in evidence.)

JOHN McEVOY,

a witness called by and on behalf of the Government, having [71] been first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is John McEvoy and I live at Lynwood, California, and am a claims adjuster for Standard Accident Insurance Company, and have been such for three and one-half years. I was formerly engaged in the securities business for about six months, in 1938, being employed by Edgerton, Riley and Walter. I know the defendants Collins, Gordon, Fischgrund, Schirm and Morgan. I first met Collins in December, 1938, and shortly after I met the other men. In December, 1938, a few days before Christmas, Collins and Joseph Murphy came to my house in Los Angeles, and Murphy introduced Collins and said Collins had a contract with the Plymouth Oil Company to purchase a million or a million and a half shares of stock of the Union Associated Mines Company; that the contract was with Plymouth Oil Company.

(Testimony of John McEvoy)

Murphy said Union Associated was formerly engaged in the mining business in Utah, and that Gordon of Los Angeles had negotiated for the purchase or obtaining of a lot of stock of that company and through his nephew, Mr. Lacey, they had formed Plymouth Oil Company in Los Angeles for the purpose of drilling wells in the Torrance region, and that Plymouth Oil Company also had some land in Devil's Den. Murphy said that Gordon was recognized as quite an oil man in Los Angeles, California, and that the stock of the Union Associated Mines, or some of it, had been acquired by Plymouth Oil Company, and that Plymouth, through the money to be furnished by Lacey, was going to drill or was drilling a well, and that Plymouth Oil Company and Union Associated were going to share in the production of the oil. (Tr. 491) Murphy and Collins then said that if I had any money or any friends with money [72] that they thought it was a good deal to purchase stock of Union Associated, and if I wanted to I could come down to the offices of the Plymouth Oil Company and there talk to Mr. Siens, who they told me was an oil man and that I could there meet the officers of the company. They said Gordon was president and Guy Davis was secretary-treasurer of Plymouth Oil Company, and Mr. Fischgrund, vice-president. Morgan was not mentioned. I went down to the Plymouth offices and met Collins, and I think Murphy was there. and I met Siens, Davis and Fischgrund. They all participated in a general talk, but neither Gordon nor Morgan were there. Siens said that an application was presented, or would be presented for listing the stock of Union Associated Mines on the Salt Lake Stock Exchange, and he said he thought that later they would have it on the San Francisco Exchange. Siens said they already had one

(Testimony of John McEvoy)

well on production in Torrance, and it was producing about 350 barrels a day, and I think he said there was either a second well started or was ready to start down in the same territory, and he said that the stock was to be handled by Mr. Barclay who was a broker in Salt Lake, and president of the Exchange, and that with Barclay pushing the stock there would be no question about the price of the stock going up, and that Siens himself thought as soon as the stock could be listed on the market, in Salt Lake, it should be bringing 10 cents a share. I think Collins and Murphy stated that they thought it would be around 10 cents when it opened up. Siens said he thought it would go to \$5.00 or \$10.00 a share in time after it had been listed, and Siens said, "You know that Collins has an agreement here with us that his price runs up to 50 cents a share ultimately," and he said, "You can see that a dollar a share would be nothing for this stock on the market." Siens said Lacey is [73] a very wealthy man and that he was putting up all the money that was necessary for all the drilling that they could hope to do, and said that it was a good opportunity to get in on the ground floor. I told him I would think it over, and I talked it over with a friend of mine and then I purchased the first batch of stock from Collins, the day before Christmas, it being 10,000 or 12,000 shares. I paid 2½ cents for it. Collins stated that he would like very much to have me try and interest my friends, to increase the number of stockholders, because they wanted to have this stock listed and have distribution and be able to trade it, and he stated that if I would interest some of my friends he would take care of me insofar as permitting me to buy some of the stock under his contract at or near the same price he was paying for it, but did not say how much.

(Testimony of John McEvoy)

(Tr. 496) Eventually I bought some stock and sold some to Hampton, to a Mr. Peet, to a Mr. Williams, to a Miss Klinger, and to Mrs. Walker, although I never saw Mrs. Walker personally. (Tr. 497) My arrangement was to buy the stock from Collins at his price from Siens, and then make my profit on the increased price at which I would sell it to various investors, and then when the stock was listed I was supposed to have an opportunity to purchase under Collins' contract and obtain whatever profit there might be through the market. Siens and Collins told me Barclay was going to run the deal insofar as the stock was concerned when it was listed on the Salt Lake Exchange and that he could be depended upon to drive the price up, and that was how I was also to make a profit, by having the right to buy some of Collins' stock under his contract. Later I met Mr. Gordon in his office in the Subway Terminal Building and I saw Schirm there, but do not believe I ever met him. I talked with Gordon, I think, in February, 1939, with reference to stock that was owned by and the anticipated purchase or more stock by Miss Walker, Miss Klinger, and Miss Davis. Gordon said he was about to leave for Texas, and wanted me to go over and see Miss Klinger and Miss Walker, and he prepared a letter which I took over to these women, Miss Klinger and Miss Walker. Siens, Gordon, and I were present. Gordon said the well was holding up fine and that there was approximately 350 barrels a day production, and that I could tell these women that that stock was expected to be listed very shortly, and there would be no doubt that that stock should go up to \$1.00 a share on that market shortly after it was listed, and that they expected to declare a dividend on the stock in March, 1939, the following month. Pursuant to that

(Testimony of John McEvoy)

conversation I visited Miss Walker and Miss Klinger the next day, in Pasadena, and sold Miss Walker some stock through Miss Klinger. I repeated to her what Siens and Collins and Gordon and Davis had told me.

A. The conversation that I had with Miss Klinger—in that conversation I repeated to her what Mr. Siens and Mr. Collins and Mr. Gordon and Mr. Davis had told me, those things that I have already related.

Mr. Cannon: Just a minute. I move to strike it out on the ground that it is hearsay as to all the defendants in the case, as to what conversation he had with Miss Klinger.

The Court: Go ahead.

Mr. Cannon: It is overruled, do I understand?

The Court: Yes.

Mr. Cannon: Exception. May I have a running exception to it all, all the conversation had between this man, who was engaged in the selling of the stock, and any conversation he had with other persons whom he sold, on the ground it is hearsay? [75]

The Court: Yes. (Tr. 502)

(Witness continuing)

At this same conversation where Siens, Gordon and I were present, Siens asked Gordon to be sure and arrange with Lacey to meet the payroll at the well while Gordon was in Texas, and Gordon then used the telephone and made arrangements for Davis to pick up the check to meet the payroll. I had conversations with Hampton, Peet, and Williams in the Plymouth office.

Q. By Mr. Manster: Now, were you using the Plymouth offices at that time? A. Yes.

(Testimony of John McEvoy)

Q. What was your purpose in using the Plymouth offices?

A. To interview anybody that might be interested in the stock of the Union Oil Company, the Union Associated Mines Company.

Q. Just give us a rough idea of who occupied these offices, who shared space there with you?

A. Well, the front office was occupied by Mr. Siens and Mr. Collins, and the one adjoining that was occupied by Mr. Fischgrund, and the one adjoining that one, all with communicating doors, was the Plymouth Oil Company offices where Guy Davis had his desk.

Q. Which room did you use?

A. The front office where Mr. Siens and Mr. Collins were. (Tr. 505) [75a]

In January, 1939, Hampton said he had already purchased stock in the Union Associated Mines Company through a brokerage house, and he wondered when the stock was going to be listed on the Exchange and as to how the production was holding up, and I repeated to him what I had been told by Siens, Davis, Collins, and Murphy, by telling him that they expected the stock to be listed some time in February, 1939, on the Salt Lake Exchange, and that the well was holding up to approximately 350 barrels a day; and that they were drilling on the other well. I believe on that occasion I sold Hampton some more stock, 5,000 or 10,000 shares. Siens, of course, told Hampton that they expected to drill many, many wells in Torrance, and that Barclay, who he described as the head of the Stock Exchange in Salt Lake, was coming down to Los Angeles shortly and that he would want him to talk to Barclay as to the listing of the stock. Later I

(Testimony of John McEvoy)

had a conversation when Barclay was present, in the Foreman Building, and Collins, Murphy, Barclay, Hampton and several others were there, and Barclay said that he had come down here first to actually see the well on production, and secondly, to be able to say for himself that he had interviewed Mr. Lacey and that he was satisfied that there would be sufficient money in the future available to continue the drilling program, and wanted to report that back to the Salt [76] Lake brokers who were going to handle the stock with him when it was listed (Tr. 508); he had gone to the well with Davis, and had met Lacey, and was satisfied that there would be all the money necessary for the drilling of the well; and he said the stock would be listed shortly, and he thought it would open up at 25 cents a share and that after several weeks trading he could see that it went up to a dollar a share on the Salt Lake market. Hampton was there and heard it, but I am not clear whether Hampton bought any more stock then, or not. Early in March, 1939, I was with Collins, Murphy, Siens, Davis and Bill Millener, and Siens and Davis stated that the well had come in and that it was doing fine and was producing about 500 barrels a day, and that if they opened it up they could get it up to 1,000 barrels a day; this was the second well. Collins was there when this statement was made. I do not know what participation Murphy had in this undertaking. I knew Murphy before he was connected with this deal. I met Millener in the Plymouth office. He was there quite frequently. I first met him during the Christmas holidays in 1938. In the offices they said that this was the same Millener who had taken an assignment on a lease from Gordon in the Devil's Den area. I never made any independent investigation on my own account in con-

(Testimony of John McEvoy)

nection with the statements that were made to me (Tr. 511), and I placed full faith and reliance on the statements that were made to me by the individuals whom I have mentioned.

Q. Did you communicate substantially the information which you received to people to whom you sold stock?

Mr. Cannon: I object, if the court please, as calling for a conclusion, and it is hearsay as far as these defendants are concerned, and no foundation laid for any such declaration.

The Court: Well, he sold the stock and he had to tell the [77] purchasers something.

Mr. Cannon: Sure, that is quite true, but I am *insist* upon the objection anyway.

The Court: He may answer.

Mr. Cannon: Exception. A. I did. (Tr. 512)

(Witness continuing)

I sold stock in the Union Associated Mines Company from January, 1939, until around the end of February or March, 1939.

Cross-Examination

By Mr. Cannon:

I am 43 years old, and before going with the Walter firm I was secretary to an attorney for four years, in Philadelphia. I am not an attorney, but I was admitted to the bar in Philadelphia, but I do not still hold my license in Philadelphia. I was disbarred; I had some difficulties there, in 1929, involving some accident cases, ambulance chasing. I was not promised immunity in this case. In April, 1939, Collins and I went to the S. E. C.

(Testimony of John McEvoy)

together and made a statement, although I did not make it when I first went up there. I made my statement near the end of 1942, in Los Angeles, but I have not read it since I was subpoenaed in this case. I do not have any memoranda from which I have been refreshing my recollection as to the dates and conversations, and I am testifying from my own memory. My talk with Collins concerning his contract was a couple of days before December 23rd or 24th, 1938; approximately December 20th. Murphy introduced me to Collins, and said that Collins had a contract with Plymouth for the purchase of a million or a million and a half shares. I do not believe I ever read the contract, although I believe that the next day [78] at the Plymouth office, or that same day, Collins exhibited his contract there, and I think I did read it. That was several days after I met Collins, I believe in December. The contract of January 17, 1939, between Siens and Collins was read by me, but I believe I read one dated prior to that, with the Plymouth Oil Company. It may have been dated January 6, but if it was dated January 6 I could not have read it in the latter part of December or the early part of January. I do remember definitely reading one that was between Collins and the Plymouth Oil Company, providing for the purchase by Collins of so many shares of stock at graduated prices, but I do not know whether it was a million or a million and a half shares of the Union Associated Mines. I did not think there was anything morally wrong in the contract. Under the arrangement I had with Collins I was supposed to get stock at or near his price, although there was nothing definite about it. He just said that he would give me some of his stock at his price, but if not there would be some slight increase for any expenses that he

(Testimony of John McEvoy)

might have. I believe I paid a half a cent more for my stock than Collins paid for his in January, 1939. (Tr. 520) I never raised any complaint about the price that I was charged for the stock. I believe it was in February that Gordon told me the well was doing 350 barrels, but I could not tell the exact date. It was the day he was leaving for Texas. I do not think it was the latter part of February, but it may have been about the middle of February. Gordon at no other time told me that the well was doing 350 barrels, and no one else told me except Mr. Siens, on a half a dozen occasions. The first time Siens told me was in December, 1938, just about Christmas time. I did not go down to look at the well at any time that I recall. (Tr. 522) [79]

Q. By Mr. Cannon: What was it you say Mr. Gordon told you in February, 1939?

A. Mr. Gordon, in his office in company with Mr. Siens, stated that the well was still producing approximately 350 barrels a day and that he had a letter that he wanted me to deliver over to the McCormick Estate for Miss Walker, and that I could feel perfectly safe in telling them over there that the stock would be listed shortly and that it should open up at about 10¢ a share.

Q. Anything else?

A. Yes. He said that Mr. Barclay, of Salt Lake City, who was the president of the Stock Exchange up there, would push this stock and it would be no trouble at all getting it up to \$1.00 a share.

Q. All right. Then what?

A. Then he made a telephone call to Roy Lacy and arranged for the payroll, for Guy Davis to either pick it up or for him to send it to Guy Davis.

(Testimony of John McEvoy)

Q. All right. And they also said in that conversation that when this stock was up to \$1.00 a share that you could make a profit on the market by selling the stock that you had a call on, is that right? A. Yes, sir.

Q. So you were in this deal, were you not, with the idea of making money?

A. So was everybody else.

Q. I am not asking you that. You were, at least, weren't you? A. I certainly was. (Tr. 523, 524) [79a] I was in this deal with the idea of making money, as was everybody else, and having this call on the stock that was covered by Collins' contract, I expected that when the stock was listed to feed my stock to the market at the increased price and buy other stock if I could get any from Collins. I got all I asked for and all that I paid for. I never had a fall out with Collins. I have not seen him in about a year's time. I am friendly with him. I did not come here voluntarily. I know that Collins filed a civil suit later, against the Plymouth Oil Company. I would not say that I was the one that got him to file that suit. I introduced him to Mr. Kennedy who was the attorney for him and who was known to Murphy and me; before we went up to see Mr. Kennedy I did not tell Collins to file the suit, that Lacey could not afford to stand the publicity of the suit. I gave my statement to the S. E. C. around the end of 1942, I am fairly sure. I also gave one on November 18, 1943; but I gave one before that, too. I did not have any fear of being indicted. When I first went to the S. E. C. I was informed that the indictments were already returned. At the time I went there they informed me of my constitutional rights. When Collins and I went up to the S. E. C. office on the first occasion, we went voluntarily, but I do not remember the name of

(Testimony of John McEvoy)

the S. E. C. man. Collins gave him some information but I did not, but I did not know that of my own knowledge because I was not present. I believe when Collins came out he said that Burr was out of town, but I don't know who he talked to, and when I went in there, I asked them if there was anything they wanted from me and I believe they said that there was not, and that if there was they would contact me, and they took my name and address. (Tr. 530) I saw Mr. Evans of the S. E. C. at one time, but [80] I never gave him any statements at that time. It was sometime during the intervening years. It wasn't right at that time. It was in September, 1942. At that time I told Mr. Evans what I have said here today. Then I went back again near the end of 1943 and told him about the same thing that I have told him in the previous statement what I have said here today.

Cross-Examination

By Mr. Blue:

I think I talked to Mr. Gordon twice in my entire life. Collins, Murphy, Siens and Davis told me in December the well was doing 350 barrels a day. Mr. Davis, Mr. Siens, both, told me the same thing. I did not sell any stock in December but I bought some for myself in December—12,000 shares, and paid $2\frac{1}{2}$ cents for them. Mr. Smith, a friend of mine, and I split the 12,000. I took 6,000 and he took 6,000, and I got from Smith one-half of what I paid. I later sold my 6,000 shares but I do not know exactly when I sold it, nor to whom I sold it. I got more than two cents for it. I think three or three and one-half cents. I don't know. I do not know who I told it to, whether it was a man or a woman. I sold some to Schwabacher & Company, a brokerage house

(Testimony of John McEvoy)

on South Spring Street, and got a confirmation of it, but goodness knows where it is now. I placed the order in my own name. It was not in December of 1938. I think it was in January of 1938. I do not know how much I sold it for. I sold all 6,000 shares and a lot of others, too. I do not know how many shares I sold through Schwabacher & Company. I have never been convicted of a felony. This is the first and only time that I have been engaged in selling stock, and I am licensed to sell stock, and got a license from the State Corporation [81] Department of the State of California as a salesman. Before that I was secretary to an attorney for about four years in Philadelphia, from 1933 to 1937. When I came to Los Angeles I went to work for Edgerton, Riley and Walter. (Tr. 538) I am married and am settling insurance claims for Standard Accident Insurance Company.

Q. Now, you remember you testified, as I understand the Plymouth Oil Company offices, and Bill Millener was there, and Siens, and Davis came in, and they said that it, that Mr. Gordon told you in February that the No. 1 well was doing 350 barrels. Now, is your memory as clear about that as it is about this 6,000 shares of stock that you don't know who you sold it to?

A. Well, I bought a lot of stock, a good many thousand shares, and I can't remember just a particular sale where it finally wound up. I don't remember that. (Tr. 539)

(Witness continuing)

I do not think I filed an income tax return in 1939 nor in 1940. When the 350 barrels was mentioned in February, I was told that well No. 2 was supposed to be in a better location than well No. 1, and that they ex-

(Testimony of John McEvoy)

pected to finish it off sometime before the end of February, 1939. I called on Miss Walker in February, 1939, but I cannot fix the exact date. I was never told in February of 1939 that the production of No. 1 well, together with No. 2 well, would give Plymouth Oil Company about 350 barrels a day. (Tr. 541) Near the beginning of March, Collins, Murphy, and myself went to the Plymouth Oil Company offices, and Bill Millener was there, and Siens and Davis came in, and they said that they had just come from the well and that it was on production and was producing about 500 barrels a day, and that if they wanted to open it up they could let it go for 1,000 a day. I do not remember that I was ever out at the well with Davis, but I have been out at the [82] Torrance Field before. I bought and paid for 6,000 shares. Smith got 6,000 shares and he called up a friend of his at the Farmers & Merchants Bank and asked about Lacey, and Smith said that if Lacey was in the deal it must be a good deal. I have been to Torrance on some occasions. That was before I became interested in this deal. I saw a lot of wells there. Prior to connecting myself with this deal I had sold interests for a man named Krause, in wells in the Torrance Field. Krause was trying to raise, I think, about \$5,000.00 additional money, and for each \$1,000.00 he was supposed to give a certain interest in the well, and I sold some of these interests to a woman by the name of White, and got \$1,000.00 and delivered her some kind of a paper prepared by Krause stating that she was entitled to so much percent of the profits of that well, but I do not remember the per cent. That was in April, 1938, but I do not recall what interest she got for that \$1,000.00. That well did not come in a producer. It was never drilled to completion because the

No. 11037

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND and
CHRISTOPHER E. SCHIRM,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In ~~Two~~ Volumes)

VOLUME II

(Pages 305 to 600, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 24 1945

PAUL P. O'BRIEN,
CLERK

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(Testimony of John McEvoy)

equipment broke. In December, 1938, when I first became acquainted with some of these men, I was told that the well had been completed in the Torrance Field, but no copies of any telegrams were shown to me that were sent to Salt Lake. I do not remember Collins having shown me any telegram that said how much the initial production was. At the time I bought my stock I think Siens told me that the company was earning about a half a cent a share at that time. I took his word for it but I do not recall whether or not I took out a pencil and figured out how it was earning a half a cent a share. I worked on Union Associated deal about three months, and I had been out at the Torrance Field twice before that. It was called a "hot spot", meaning that there was a lot of [83] activity there. I saw a map of the Torrance Field while I was in the Plymouth deal and this map showed the oil wells spotted on it. I never did see the wells of the Plymouth Company. I never saw No. 2 being drilled. I believe No. 2 came in around the end of February. I was in the office at the time and I talked with Collins, Murphy, Siens and Davis, and I think Millener was there but I wouldn't say that, but I think Siens and Davis were down at the well practically all night about the time that it came in. When the well came in there was plenty of excitement around their office and they were talking about the well having come in. I was interested because I owned stock myself. The most I ever owned was about 15,000 shares, for which I paid prices up to, I think, $3\frac{1}{2}$ or 4 cents a share. I resold them. Everything I got for the stock over and above the price that I paid for it I kept myself, and did not turn it over to Collins, Gordon, or to any of the other defendants. Even though I believed the statements that were

(Testimony of John McEvoy)

made to me, I did sell the stock because I had a right with Collins and Murphy to purchase some more. If the well was producing 350 barrels a day I did not know that the earnings on such a well were more than I was actually paying for the stock because Siens and Davis said that the money for drilling the well, which was advanced by Lacy to Plymouth, had to be repaid first. This morning I said that I understood that the Union Associated had a 50 per cent interest in the well, but that it was subject to the repayment for the cost of the well. The Union Associated Mines Company issued literature on that. I think Government's Exhibit No. 3 is one of the letters on that.

(At this point, Mr. Blue read Government's Exhibit 3, in evidence, as follows:)

[PLAINTIFF'S EXHIBIT NO. 3]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130
Suite 526 Utah Oil Bldg.
Salt Lake City, Utah

January 6, 1939

To the stockholders of the Union Associated Mines Co.:

Since our last letter, your Company has completed its No. 1 well in the Torrance Field. To December 31, 2,000 barrels have been produced and shipments are being made to the Standard Oil Company of California. This continuous production points to a dividend in a few months, and we, therefore, suggest that any certificates

(Plaintiff's Exhibit No. 3)

which are not in the owner's name, be sent in immediately for transfer.

The future of the Company looks promising. A contract has been entered into which provides for the drilling of well No. 2 in the Torrance Field located between well No. 1 and another producing well. The contract provides that the Union Associated will exchange 635,000 shares of treasury stock for half interest in production, after deducting usual land owners royalty. The Plymouth Oil Co. will pay all costs of drilling until production is secured. The costs of drilling (not to exceed \$37,500.00) will then be taken from 80% of oil production; after which the Union Associated and Plymouth Oil Co. will divide 50-50.

Operations at well No. 2 have been started by erecting a derrick. Necessary machinery to complete the well will be moved on in due course.

In addition to the above, a contract has been entered into whereby the Union Associated will acquire a 40-acre lease in Section 2, Township 25 South, Range 18 East in the North Kern County District, in exchange for 235,000 shares of treasury stock. The Kern County area is exciting much interest at the present time. The 40 acres joins land now controlled by the General Petroleum Company. It will not be necessary for your Company to drill this block of ground until the area has been more definitely proven by other drilling.

The foregoing is a continuation of the policy of your Directors to build up the assets of the company by acquiring oil land in proven and semi-proven area.

(Plaintiff's Exhibit No. 3)

The officers of the Union Associated Mines Co. intend to file application for relisting the stock on the Salt Lake Stock Exchange as soon as the necessary papers are completed.

UNION ASSOCIATED MINES CO.

J. H. Morgan, Secretary.

P. S.: If you are the owner of stock not in your name, please do not fail to have your stock transferred to your own name and send in your correct address.

[Endorsed]: Securities and Exchange Commission. Docket D 515. Commission's Exhibit No. 225. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters; by Garnett.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 3 Identification. Date Jul. 6, 1944. No. 3 in Evidence. Date Jul. 14, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

[84]

(Witness continuing)

After hearing that letter read, it refreshes my recollection that the interest the Union Associated had in No. 2 well was a 50 percent interest in the net production after the cost of drilling the No. 2 well. It was my understanding that that was the deal that was on the first well, too (Tr. 561), but I do not know whether I told other people that. I still believe that was the understanding. Siens and Davis told me that; that is my recollection. I told that to Mr. Smith and to everyone else.

(Testimony of John McEvoy)

It is not my recollection that the Union Associated had a 50 per cent gross interest in the first well without any charge against it for drilling or participating cost. (Tr. 562) I never knew otherwise. I did not know that Union Associated had anything to do with the Factory Center site, embracing 72 acres, with a 25 per cent interest in it; or in a lease at Lomita, although I think I did hear something about the latter. I did not get any literature when I went out to sell this stock, but I relied upon Siens, Davis, Collins and Murphy for my information. I think I first talked to Gordon in February, 1939. Besides Mr. Smith, I sold Union Associated stock to Mr. Hampton, and repeated to him what had been told to me by the various persons; that the well was producing approximately 350 barrels a day, and that they expected to declare a dividend in the next month or two, and that they expected the stock to be listed also within the next month or two. I think that's about all. [85] I do not think I told him what interest the Union Associated had in the well. He knew that. He had bought stock before from some brokerage house. I happened to go to Hampton because I think he called Davis for some information and then Davis asked me to contact Hampton. He said he thought that he had a couple of other friends that might be interested, and I think I told Hampton at that time what the assets of the Union Associated were, in that they had this contract with the Plymouth Oil Company and that they were attempting to obtain some other acreage in Devil's Den, and they expected to continue on drilling down in Torrance for the time being. I believe I told him that Union Associated had a 50 per cent interest in the production after drilling costs were paid. I also sold to two of his friends, Mr. Peet and Mr. Wil-

(Testimony of John McEvoy)

liams, to whom Hampton introduced me. I told Williams the same thing that I had told Hampton although I am not clear whether I told him anything about the Devil's Den ownership. I did not tell him about the Factory Center site. I do not think I showed him any literature, or newspaper clippings, although I may have. Mr. Siens gave me some newspaper clippings but I do not have them now.

Cross-Examination

By Mr. Cannon:

I bought some stock from Collins at or near the price he was paying Mr. Siens for it and I also bought some stock directly from Plymouth, and paid Davis for it up in the Plymouth offices. I did not have an office there but used the facilities of that office as everybody did who was interested in Union Associated Mines stock. I did not have a telephone there myself, but I used that telephone in contacting my people, the same as Collins, Siens, or anyone [86] else did. I met Morgan in the Plymouth Oil office once or twice; once when he came there with an application for the listing of the stock on the Salt Lake Exchange. Then I think he came there another time with Barclay. I do not think I talked to Morgan and he was not present at the time any of the statements which I have made were made as to the production of the well. I knew that Murphy, as a matter of fact, was an even partner with Collins in this contract. I think it was in December, 1938, that I first heard that the stock was going to be listed on the San Francisco Exchange. I know at one time they showed me a letter that had been received from the San Francisco Stock Exchange. I was shown the letter of which the photostat copy that you now show

(Testimony of John McEvoy)

me is the copy, dated January 11, 1939, but I cannot say when I first saw that letter. (Tr. 574)

(The document referred to was marked Defendants' Exhibit D and received in evidence, and read as follows:)

[DEFENDANTS' EXHIBIT D]

Secretary's Office

SAN FRANCISCO MINING EXCHANGE

327 Bush Street, San Francisco

Via Air Mail

January 11, 1939.

Mr. R. R. Bray, President,
Union Associated Mines Company,
Suite 526, Utah Oil Building,
Salt Lake City, Utah.

Dear Sir:

We have received numerous inquiries concerning the operations of your company in the oil fields of California, many of them from stockholders and prospective investors in San Francisco.

Although your securities are not now listed, we understand that you intend to apply for listing on the Salt Lake Stock Exchange. Some of our broker-members have asked me to write to you, suggesting that you also list on the San Francisco Mining Exchange on account of the interest in the market for Union Associated Mines on the Pacific Coast and on account of the fact that the California fields are the scene of your company's operations.

(Defendants' Exhibit D)

We are taking the liberty of enclosing one of our listing applications, in the event your directors should choose to extend the market for your securities to Pacific Coast communities. While you are preparing your listing and registration papers for the Salt Lake Stock Exchange, it would be a simple matter to make an extra copy to cover your listing here.

We believe that the company would benefit greatly by broadening the market through listing in San Francisco and providing convenient trading facilities for Pacific Coast investors.

Very truly yours,

Frank J. Carter

Frank J. Carter, Secretary.

FJC:JC.

ENCL:1.

[Endorsed]: Case No. 15229-Cr. U. S. vs. Collins et al. Defts. Exhibit D in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Witness continuing)

The book called "My Scrap Book" is Siens' scrap book, and I saw it around the office from January until March, 1939, and I think I read it and relied on the things said in it, but I do not know that I used the scrap book to find out details as to the activities in the stock and other matters therein referred to, but I believe I did.

(The document referred to was marked for identification as Defendants' Exhibit E.)

(Testimony of John McEvoy)

(Witness continuing) [87]

I think I read the circular letters in here which are form letters now in evidence, dated September 29, 1938, at the time I was there, and I relied upon the statements therein contained. I also saw the one of January 6, 1939, which is a form letter, and I relied upon those statements. While I was there I think I saw letters that came in from Morgan to Siens. Siens, Collins and I occupied the same front office. I do not think Siens did his dictating in the same office where we were working. I do not know where he dictated. I never heard him dictate anything.

Re-Direct Examination

By Mr. Manster:

Mr. Joseph Murphy had an interest in Collins' contract. Murphy was selling Union stock. I believe I saw Morgan on two occasions at the Plymouth Oil Company offices. Once he came there in connection with a relisting of the stock on the Salt Lake Stock Exchange. I do not think I ever had any conversation with Morgan.

Recross-Examination

By Mr. Blue:

Mr. Gordon and Mr. Davis sent me to Paradena to see these women. It was not Mr. Gordon and Mr. Siens who sent me there.

(Witness excused.)

It was then stipulated that a group exhibit of 10 photocopies of letters on the stationery of J. A. Barclay & Company, addressed by Barclay to Collins, might be introduced in evidence, and that they were voluntarily produced by Collins to the Securities and Exchange Commission before the indictment return. [88]

Mr. Cannon: Let them go in. As far as I am concerned, I only reserve the objection as far as Mr. Morgan and all other defendants are concerned that it is hearsay as to them.

The Court: All right, the exhibit may be received.

(The documents referred to were marked Plaintiff's Exhibit No. 26, and received in evidence.) (Tr. 591)

MISS MATHILDA M. KLINGER

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Mathilda M. Klinger and I live in Pasadena, and in 1938 and in early 1939 I was secretary to Miss Grace T. Walker, who was in charge of the McCormick estate in Southern California with winter quarters in Pasadena and summer quarters in Santa Monica. I, together with Miss Walker, Miss McLane and Miss Davis, bought some Union Associated Mines Company stock. Miss McLane and Mr. Gordon were acquainted. I first heard of Union Associated through Miss McLane and purchased stock in that company through Miss Walker. Our first purchase was in October, 1938. I made the purchases for them all, that is, I bought it for Miss Walker, and we bought ours from Miss Walker, but I

(Testimony of Miss Mathilda M. Klinger)

handled the transaction. We bought 40,000 shares and paid \$1,500.00 for it by cashier's check delivered to Mr. Adkisson. Miss McLane brought Mr. Adkisson down and introduced me to him as Mr. Gordon's secretary, and I delivered the \$1,500.00 check to Mr. Adkisson at the McCormick estate in Santa Monica. Of the 40,000 shares I took 4,000 shares for \$150.00, Miss Davis took 4,000 shares, Miss McLane took 5,333 shares, and Miss Walker took the balance. The stock certificates were delivered to us in March, 1939. [89] After the initial purchase, we purchased some more stock through John McEvoy, in January, 1939. Miss Davis and I had a conversation with him in Pasadena.

Q. What, if anything, was said by Mr. McEvoy to you with relation to the Union Associated Mines Company or the Plymouth Oil Company?

Mr. Blue: If the Court please, I will object on the ground that it calls for hearsay. It is incompetent. The only evidence being here that Mr. McEvoy when he called on people, acted as an independent contractor. These defendants are not bound by anything that he did.

The Court: You may answer.

Mr. Blue: Exception. And, if the Court please, without the necessity of restating the objection, it is understood as to all conversations this witness had with Mr. McEvoy and that the same objection will be understood to have been made, the objection overruled, and exception noted. (Tr. 599)

(Witness continuing)

McEvoy said that the first well had been drilled and it was coming in at the rate of about 200 barrels a day:

(Testimony of Miss Mathilda M. Klinger)

that they were selling it at about \$1.05 per barrel to the Standard Oil Company, and that they were making good money and they hoped soon to drill another well; that the Plymouth Oil Company were drilling the well on a 50-50 basis with the Union Associated Mines, with Plymouth Oil Company paying the expenses of drilling. McEvoy said that the Union Associated Mines Company was earning $2\frac{1}{2}$ cents a share and there were 1,400,000 shares of common stock outstanding, no other indebtedness; and that they were going to drill another well which, if it was successful, should bring in just as much oil as the other well did. McEvoy said that they were hoping to get the stock relisted on the Stock Exchange, and that they had [90] made an application, and hoped within a week or ten days to have it relisted; that it had been listed at one time and had been retired because the mine was idle. I do not know how many conversations I had with McEvoy, but I know he called several times and I talked to him on the telephone several times. He called to sell more stock. After he called to say that the second well had been drilled, and that it was producing about 300 barrels a day, he said that as soon as the stock was listed on the Exchange it would probably go to 50 cent a share, and that the Plymouth Oil Company was interested in it because of the investment and they would do what they could to help push the stock up. He said Plymouth Oil Company had an investment of about \$30,000.00 in the well. I made another purchase of 3,000 shares in two lots, 2,500 shares in January and 500 shares in March (Tr. 603) at 4 cents, all from Mr. McEvoy. Miss Davis purchased 1,000 shares and Miss Walker purchased 15,000 shares, all at 4 cents a share.

(Testimony of Miss Mathilda M. Klinger)

(By stipulation, Plaintiff's Exhibit No. 27, a cancelled check dated January 7, 1939, payable to John McEvoy in the amount of \$100.00, drawn by Mathilda M. Klinger, was received in evidence; and Plaintiff's Exhibit No. 28, a check dated March 1, 1939, payable to John McEvoy in the amount of \$20.00, signed by Mathilda M. Klinger; and Plaintiff's Exhibit No. 29, stock certificates, one numbered 4114 of Union Associated Mines for 2,500 shares in the name of Mathilda M. Klinger, and another one numbered 4115 for 500 shares, in the names of Mathilda M. Klinger, each dated February 8, 1939, were offered and received in evidence, with the following understanding:)

Mr. Blue: * * * The same stipulation, subject, of course, to the running objection as to hearsay as to all these transac- [91] tions with McEvoy. (Tr. 605)

(Witness continuing)

As secretary for the McCormick estate in 1938 or 1939, the mail coming into the office was brought into the office in Pasadena by the gate man, and at Santa Monica by the chauffeur who went down to the post office for it, and I distributed it to whomsoever it was addressed. As a stockholder of the Union Associated Mines Company I received a dividend upon my stock, and the document which you hand to me appears to be a printed copy of a letter dated August 1, 1939, and a duplicate of Exhibit 6 which is now in evidence, was received by me at or about or shortly after its date.

(The document referred to is marked Plaintiff's Exhibit No. 30 for identification.)

(Testimony of Miss Mathilda M. Klinger)

(Witness continuing)

I received Exhibit 30 through the mail.

In March, 1939, I received the certificates for the first purchase that I made in this stock. I do not have those certificates now because in April they were returned to Mr. Gordon for the return of the money paid for them, which was \$1,500.00, and that covered the stock purchased by the 4 ladies. Prior to the receipt of the \$1,500.00 I called Gordon's office over the phone and asked for Mr. Gordon [92] and he was not there, and I asked for his secretary, and I talked with someone who said he was the secretary. I do not know whether I subsequently talked to Mr. Gordon, but I remember that I delivered Miss Walker's message and the money was returned in about a week or ten days by Mr. Gordon, for the original purchase, \$1,500.00.

Cross-Examination

By Mr. Blue:

The document which you show me bears my signature and the signatures of Miss Walker, Miss McLean and Miss Davis.

(Document referred to was marked Defendants' Exhibit F, and was received in evidence.)

(Witness continuing)

I met Mr. Adkisson and Mr. McEvoy but not Mr. Siens and I do not recall having met Gordon, Fischgrund or Schirm, but I met Collins one time. He came with McEvoy, but did not sell me anything. The last time I bought I gave McEvoy a \$20.00 check for 500 shares at 4 cents a share. I was taking a flyer to make it an even

(Testimony of Miss Mathilda M. Klinger)

3,000 shares. I knew that when I purchased stock in an oil venture that it was a gamble. When I first bought stock and put \$150.00 in it and gave that money to Adkisson, Adkisson did not tell me anything about it. I got my information from Miss McLean. (Tr. 612) When I bought this stock first, I knew that I had a guarantee from Gordon that if I wanted my money back I could get it; but I did not get any guarantees from McEvoy. When I requested Gordon to repay the money, I received it in the form of a cashier's check. (Tr. 613) After I received that check I returned the stock certificates that I had received. So far as any transaction that I had with Gordon was concerned, personally, all I had to do was to ask him for the money and I got it back. I did not tell him that any one had made any mis- [93] representations to me. I do not recall that either Mr. Gordon or Mr. Adkisson told me anything personally, when I purchased this stock from Gordon.

Re-Direct Examination

By Mr. Evans:

I made my second purchase through Mr. McEvoy before the return of the \$1,500.00 to me. Mr. McEvoy was accompanied by Mr. Collins on one visit, and that was my only meeting with Collins. It was after the purchase of the second block of stock that I met Collins, but Collins did not participate in my discussion with Mr. McEvoy. Collins sat out in the car.

Recross-Examination

By Mr. Blue:

I was just introduced to Collins. I do not recall when McEvoy talked with me, he explained to me that the No. 1

(Testimony of Miss Mathilda M. Klinger)

well of the Plymouth Oil Company gave to the stockholders of Union Associated Mines a 50 per cent overriding interest without any cost on the drilling of the well. And I do not recall that he told me there was any distinction between No. 1 well and No. 2 well.

GRACE T. WALKER,

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Grace T. Walker. I was formerly employed by the McCormick estate, and Miss Klinger who has just testified, worked under my direction. In the fall of 1938 I purchased certain stock of Union Associated Mines Company. Of the 40,000 shares that we all purchased, I got 26,000 shares [94] and the rest of the 40,000 shares was taken by Miss Klinger, Miss Davis and Miss McLean. I did not see Gordon when the stock was offered to us because I was not in town. I met John McEvoy twice, once in Pasadena and the other in Santa Monica. I had a conversation with him.

Mr. Blue: I will object to that, if the Court please. Just a moment, Miss Walker. I will object on the ground that it is hearsay as to all these defendants, and it is incompetent. There is no foundation laid justifying any conversations had between this witness and Mr. McEvoy.

The Court: The witness may answer.

Mr. Blue: Exception, and the same objection will go to all her testimony with Mr. McEvoy. (Tr. 619)

(Testimony of Grace T. Walker)

(Witness continuing)

First McEvoy recommended to us that we get our money back on the first purchase and buy a second time, to buy more because the Plymouth Oil Company had taken a 50 per cent interest, and they would naturally want to get their money back, and the first well was producing 200 barrels a day; and in the next conversation about it he said they were making 300 and it was $2\frac{1}{2}$ per cent, and that they expected they would get 50 cents a share for it, and since the Plymouth Company wanted this stock they would certainly boom the stock so it would go up, so that they would get back their 50 per cent. He said that the stock had formerly been registered at Salt Lake City but it had gone off and they were expecting to have it registered at the time. I telephoned him many times trying to find out but I never found out whether it ever was registered again. I think something was said by him as to the number of Union Associated shares that were outstanding at the time, but I do not remember what it was. McEvoy told me at one time that well No. 1 produced 200 barrels, and the [95] next time I saw him he said it was 300.

Mr. Evans: It is stipulated, your Honor, by and between counsel for the defendants and the prosecution that Exhibit No. 31 may be received in evidence at this time. I wish to read Exhibit No. 31 to the jury at this time.

Mr. Blue: You had better have it marked first.

(The document referred to was marked Plaintiff's Exhibit No. 31 and received in evidence.)

Mr. Evans: Exhibit No. 31 is upon the letterhead of F. V. Gordon, bearing the date February 3, 1939.

(Testimony of Grace T. Walker)

Mr. Blue: If the Court please, before it is read I would like to have the record show an objection is made on behalf of all defendants other than Mr. Gordon as to the admissibility of this letter on the ground that it is hearsay.

The Court: All right.

Mr. Blue: Exception. (Tr. 622)

(At this point, Exhibit No. 31 was read, and is as follows:)

[PLAINTIFF'S EXHIBIT NO. 31]

F. V. GORDON

Oil Development

612 Subway Terminal Building

Los Angeles, California

Michigan 2151

February 3rd, 1939

Grace T. Walker

1400 Hillcrest Ave.

Pasadena, California

Dear Mrs. Walker:

I understand that you desire the Union Associated Mine stock distributed as shown on the accompanying letter, if so please sign the letter so that we can have the stock transferred in Salt Lake City.

This stock may not be returned here until about the 16th of February, but the dividend which will be declared on or about the 15th will reach you whether or not the stock is actually in your possession. Should you

(Plaintiff's Exhibit No. 31)

desire any more of this stock we can arrange to get it for you through the bearer McEvoy and I am sure that the stock will be valuable in the near future.

I have been ill for the past two weeks and regret that I have not seen you but hope that I may have the pleasure upon my return from Texas about February 25th.

Please give my best wishes to Miss McLean.

Sincerely yours,

Fred V. Gordon

Fred V. Gordon

FVG'JB

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 31 in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

On the stipulation of counsel, Government Exhibit No. 32 was offered and received in evidence, consisting of 15 stock certificates numbered 4336 to 4350, inclusive, all in the name of Grace T. Walker and issued by Union Associated Mines Company under date of March 9, 1939. (Tr. 623)

(Witness continuing)

The document which you have shown me, and marked Government's Exhibit No. 33, for identification, being a letter [96] dated March 2, 1939, was received by me on or about the date it bears. I suppose it came through Miss Klinger who handled my mail, but I do not remember whether or not I received it through the mail.

(Testimony of Grace T. Walker)

Cross-Examination

By Mr. Blue:

Mr. McEvoy advised me to get my money back on the first purchase I made. I do not remember whether he said why I was to do that, or not. I took his advice and believed what he told me and got my money back. I do not remember when well No. 2 came in, but I remember they drilled two wells. He did not tell me that well No. 2 had come in for 300 barrels.. I do not remember that. When I bought my second stock, Mr. McEvoy told me that it could be purchased on that same guarantee that Gordon had given me on my first block, but I did not get any written guarantee from McEvoy, but I had gotten a written guarantee from Mr. Gordon on the first purchase. I got that written guarantee from Mr. Adkisson on Mr. Gordon's behalf, and it is in evidence as Defendants' Exhibit B. I did not ask McEvoy for a written guarantee. I allowed Miss Klinger to deal with Mr. McEvoy and what Miss Klinger told me I relied upon.

(Witness excused.)

MISS MATHILDA M. KLINGER,

recalled as witness by and on behalf of the Government, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Evans:

I remember Government's Exhibit No. 33. It came through the mail was was delivered on or shortly after the date of Exhibit 33. [97]

MRS. MARGARET FLORENCE PERRI,

called as a witness by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

I live in Salt Lake City and was employed by the defendant John H. Morgan from November, 1938, until the end of December, 1939, as his stenographer and worked for him during that entire period. I was the only young lady employed by Morgan at that time. By reference to the minutes of Union Associated Mines Company, it appears that I was on March 3, 1939, appointed the transfer agent of the Union Company, and as transfer agent I transferred the old stock that was either mailed or brought in, and cancelled it, and made the necessary notations, and filled out the new stock and either mailed it or gave it back to the person to whom it was to be given. Those were part of my duties. I remember that certain printed stockholder letters were sent to the stockholders of Union Associated Mines Company. The printed letter dated August 1, 1939, marked Government's Exhibit No. 30 for identification, is a duplicate or a replica of a stockholder's letter which came to our office during the period of my employment, and after it was received at our office I mailed them to the stockholders according to a list furnished to me by Mr. Morgan. I addressed the envelopes for each letter and enclosed the letter, stamped the envelopes and put them in the mail chute. I personally deposited those letters in the mail chute, with the names and addresses as I have testified. That procedure was followed in connection with Exhibit No. 30, I suppose, but I do not remember distinctly. Let-

(Testimony of Mrs. Margaret Florence Perri)

ters of the kind like Exhibit No. 30 were mailed to those stockholders who were living outside of Salt Lake City, by me. [98]

Q. It has been testified in this case, Mrs. Perri, that the document which is marked Government's Exhibit 30 for identification was received at Santa Monica, California, by M. M. Klinger. I will ask you whether or not you can now state whether Exhibit No. 30 was deposited in the United States mails by you?

Mr. Blue: Now, just a moment. I object to the form of the question, if the Court please. It is definitely asking for the conclusion of the witness. Also, it is leading, and there is no foundation laid for the question as asked.

The Court: She may answer.

Mr. Blue: Exception.

A. I don't remember Miss Klinger's name.

* * * * *

Mr. Blue: It is certainly a highly suggestive question.

The Court: All right, she may answer.

A. It was deposited by me. (Tr. 634-635)

(Witness continuing)

Government's Exhibit No. 33 bears my signature. I typed it and signed it and then I put it in an addressed envelope, stamped it, and dropped it in the chute. This was done on or about March 22, 1939.

Mr. Evans: Now, at this time, your Honor, I wish to renew my offer for the receipt in evidence of Government's No. 30.

(Testimony of Mrs. Margaret Florence Perri)

Mr. Blue: If the Court please, at this time I wish to object to the offer on the ground they are entirely irrelevant * * * I therefore contend that these letters are immaterial and incompetent for any purpose.

* * * * *

The Court: Objection overruled.

Mr. Blue: Exception.

Mr. Evans: Exhibit 30 is received in evidence, your Honor? [99]

The Court: Yes.

(The document heretofore marked Plaintiff's Exhibit No. 30 was received in evidence.)

Mr. Evans: Now, your Honor, I wish also to offer in evidence Exhibit No. 33, the last letter under discussion with this witness.

The Court: All right.

Mr. Blue: Now, if the Court please, in addition to the grounds of the objections both to Exhibit 30 and 33, I wish to add this further objection, that they are hearsay as to each and every defendant and there is no foundation laid and they are therefore incompetent. There is no showing that these defendants had anything to do with the mailing of the letter except the defendant Morgan.

The Court: Objection overruled. Note an exception.

(The document heretofore marked Plaintiff's Exhibit No. 33, was received in evidence.) (Tr. 637-638) [100]

(Witness Perri temporarily excused.)

HAROLD V. DODD,

a witness called by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is Harold V. Dodd and I am a Deputy State Oil and Gas Supervisor and Petroleum Engineer, and have been in my official position for about three years. I examine all the available geological information, Government reports, well records, and use this information in connection with the drilling, maintenance, and abandonment of oil wells in Kern, Tulare, and Inyo counties. Reports of production are required by individuals or companies drilling wells, setting forth each calendar month beginning during the month following that in which the well started to produce, and in these reports they must identify the well, its location, the amount of oil produced, the amount of water, the number of days during the month in which the well produced, and must give the number of wells that were idle during the month, and other information. (Tr. 642). I was served a subpoena to produce the production records with reference to Lube Oil Company Gordon well, drilled in Section 2, township 25 south range 18 East, Kern County, California, but there are no such production records. The well was spudded in on November 26, 1936.

Q. By Mr. Manster: Can you tell us to what depth that well was drilled?

Mr. Cannon: I will object to that, if the Court please. It has no bearing on the issues in this case and could have no bearing, primarily because of the fact that it antedates any period laid in this indictment. (Tr. 644) [101]

(Testimony of Harold V. Dodd)

Mr. Manster: The materiality of the evidence we wish to produce is this: According to this lease from Gordon and his wife and others, his interest in this particular property was leased to one William Millener on December 29, 1938, according to Exhibit No. 24 in evidence. Millener, on January 5, 1939, leased this particular property or assigned the interest in the lease that he acquired from Gordon to the Union Associated Mines Company in return for a block of 235,000 shares which is proved in the record.

Now, we want to show, according to the allegations of the indictment—

Mr. Cannon: Just a moment. I will object to counsel making the statement on the ground that it has no probative value. What occurred in 1936,—your Honor will recall that when he made the statement in his opening statement as to what he intended to prove regarding the Devil's Den lease, at that time your Honor ordered it stricken out, I think, on Mr. Blue's objection. At least I know Mr. Blue made an objection to it, and it has no value here.

Mr. Manster: I will show the materiality in this fashion, Judge. The indictment alleges that it was a further part of said scheme and artifice that the defendants would lease and assign and cause to be leased and assigned unproven and undeveloped properties claimed by defendants to be of value to said corporation and secure for themselves from said corporation 235,000 shares of the stock of said corporation.

Now, we maintain that a dry hole was drilled in this particular section in 1936 and 1937, and that Mr. Gordon knew at that time that that property was undeveloped and

(Testimony of Harold V. Dodd)

unproven by virtue of that dry hole, and that was at the time that he transferred or he assigned his interest in that property to Mr. Millener. [101a]

Mr. Cannon: May I offer this suggestion, if the Court please? It is not a question of what the value of the lease was in 1936 that is in issue here. It is a question as to what value, if any, there was to the lease at the time of the assignment of Gordon to Millener and Millener to the company.

Mr. Manster: Precisely, but we contend that as of December 29, 1938, by virtue of that dry hole that had been drilled just three-quarters of a mile south of the 40 acres which Gordon transferred to Millener, that Gordon knew that property was unproven and would be unproductive because of the existence of that dry hole that had been drilled on it. (Tr. 644, 645, 645a) [101b]

Mr. Cannon: If the Court please, in speaking of the scienter that Mr. Manster refers to, I merely make this inquiry to make the point of my objection. How could what Gordon knew in 1936 be attributed to the rest of these defendants at all in view of the fact that the prosecution sought to limit this conspiracy, not to 1936, but to June, 1938, a year and a half or two years after this well, as he says, was spudded in, and, I suppose, uncompleted? It could not have any bearing upon the issues either under the indictment as to any of the defendants nor under the indictment as to specific defendants, other than Gordon.

The Court: Well, only to this extent, they knew that ground had no value.

Mr. Cannon: If they knew it.

Mr. Manster: That is the point.

Mr. Cannon: But there is no evidence that they did.

The Court: They can show by this witness.

(Testimony of Harold V. Dodd)

Mr. Cannon: You do not contend that the defendants had anything to do with the spudding of this well other than Gordon?

Mr. Manster: No.

Mr. Cannon: Then I object on the ground—

Mr. Manster: That the defendants knew by virtue of this assignment to Millener and to the Union Associated Mines Company in exchange for this 235,000 shares of stock, they knew the nature of this land with regard to its productive qualities for oil. This is allegation of an indictment which we are endeavoring to prove.

The Court: All right, go ahead.

Mr. Cannon: May we have an exception to all the testimony offered and an objection and an exception deemed to have been taken to it all? [102]

The Court: Yes. (Tr. 646-647)

(Witness continuing)

The well was drilled to a depth of 4270 feet on March 4, 1937, and operations were suspended on April 28, 1937. There were no production reports of oil filed in connection with this well. This particular well is slightly less than three-quarters of a mile from the Northeast Quarter of the Northwest Quarter of Section 2, Township 25 South, Range 18 East, M. D. B. and M. (Tr. 648), which last described tract is 40 acres in extent. I examined it on June 29, 1944. I did not make any examination on this tract between December, 1938, to December, 1939. There are no records in our office indicating the production of any oil or gas during the period 1938 and 1939, from Section 2, Township 25 South, Range 18 East.

(Testimony of Harold V. Dodd)

Cross-Examination

By Mr. Blue:

I have been with the State Board of Oil and Gas something over 22 years, and during that time I have seen a lot of oil fields brought in in California. There have been cases where oil fields have been brought in that were three-quarters of a mile from wells that have been drilled and found dry, but I would not know whether there were a lot of them. I remember the Shark Tooth field, an extension of the Round Mountain field in Kern County. I recall that the producing well that discovered that field was about a quarter of a mile away from a well that had been drilled and found dry. (Tr. 652) I imagine there are dry holes drilled to a shallow depth on lands on which they are finding wells now in the Buena Vista field. A good many dry holes were drilled on the Tejon Range field before they drilled a producing well. I do not know whether it is a mile, a half a mile, or two miles, [103] between the dry holes and the well that produced oil. I would not know how many wells, according to our records, have been drilled on what is known as the Devil's Den area, but I do know a great many wells have been drilled up there, in what we call the old Devil's Den producing area, somewhat south of this particular land. I do know that there are some small producing oil wells at the present time in what is called the Devil's Den area. I do not know whether or not the General Petroleum Company owns the 40 acres adjoining the land described to me by Mr. Manster. I did not look it up. I know the Pos Creek field. There are a great many wells there. The whole country east of Bakersfield field is precarious drilling and there are many dry holes in and around there, and directly

(Testimony of Harold V. Dodd)

alongside of these dry holes there are producing wells (Tr. 655), and to the average person the structure appearance of the land is no different outwardly where the wells are producing oil and the property that is dry. I know of the Kettleman hills area. It is divided into three sections, the north dome, the middle dome, and the south dome. No production has been found on the south dome, but I would say that there were four or five dry holes drilled there, but not more than two or three to any considerable depth. The Ohio Oil Company drilled one dry hole there. There have been dry holes drilled in the middle dome of Kettleman Hills. The whole field is abandoned now, and approximately 5 or 6 wells have been drilled there by the major companies. The north dome of Kettleman Hills is one of the finest fields in the world, and they drilled a number of dry holes there, but they did not have the equipment to get deep enough to find the oil and that was the reason for those dry holes; in other words, they stopped drilling at 4,000 or 5,000 feet. One of those old wells was drilled be- [104] tween 1912 and 1914, I think, and would have gotten commercially productive between 6,000 and 7,000 feet. It is possible that if this Devil's Den well that was drilled to 4270 feet had gone deeper, they might have gotten a producing well. I have an A. B. in geology, but I have not actually practised geology since I got out of college. In my job with the State I have to study the geology and check up the structures and elevation because we have to approve and shut off the water and all that sort of thing. (Tr. 658) I have never taken up leases myself or produced any oil; nor have I drilled any oil well, but I have owned a little stock in an oil company, but never had anything to do with the management. To a very limited extent, I have bought

(Testimony of Harold V. Dodd)

stock on the theory that I felt the company had a good play in a given section and then I got my fingers burned. I never monkey with wild cat deals. I do not think that by just drilling a particular well in the Devil's Den area to a depth of 4270 feet, at which depth drilling was suspended, that a 40 acre piece of ground three-quarters of a mile away would necessarily be valueless. You would have to take into consideration other factors.

Cross-Examination

By Mr. Cannon:

The drilling of a dry hole in an area three-quarters of a mile away from a particular spot would not necessarily condemn that land. A year or so ago I condemned as non-productive and as having no value for oil a certain part of the property in the Round Mountain area, and thereafter the very land which I had said had no value as oil land was leased by the Texas Company at a bonus of \$324.00 an acre, but it was just production acreage, and they gave up the land without drilling. [105]

Re-Direct Examination

By Mr. Manster:

What is known generally as the Devil's Den area embraces about two or three townships and embraces 12 to 18 sections, a section being 640 acres. (Tr. 665) At any time during 1938 the highest number of wells producing in that area was 20.

Q. Can you tell us what was the total amount of barrel production from those 20 wells?

Mr. Cannon: I will object to that as being immaterial altogether. (Tr. 666)

* * * * *

(Testimony of Harold V. Dodd)

The Court: Well, what we are primarily interested in is the value of these 40 acres, and all you attempt to show first by the witness is that this well has been drilled within three-quarters of a mile away.

Mr. Manster: That is right.

The Court: And therefore we were to draw whatever inference we could from that as to the value of this land, and subsequently, on cross examination, the witness said that it wouldn't make any difference.

Mr. Manster: We contend that is some indication of the probability of finding oil. If a dry hole is drilled within three-quarters of a mile in a particular area, we contend it is some indication as to whether or not oil in productive quantities would be produced.

Now, it has been brought out here that certain areas, certain acreage in the Devil's Den area have produced oil, and we would like to show just what the production was in 1938 and 1939.

Mr. Cannon: Then I will add to my objection heretofore given that this is an attempt to impeach his own witness. [106]

Mr. Manster: No, I am not impeaching him at all. I am merely asking for his records.

The Court: Go ahead.

Mr. Cannon: Exception.

The Witness: 9,094 barrels. (Tr. 667-668)

(Witness continuing)

That would be an aggregate production of 9,094 barrels for the entire year of 1938. During the year 1939 there were 14 producing wells with an aggregate production of 4,724 barrels, or about .92 barrels per day.

(Testimony of Harold V. Dodd)

Recross-Examination

By Mr. Blue:

All of these wells ranged from less than 400 to 500 or 600 feet. These figures I have given include the wells to the north and some of that production is coming from around 2,500 feet, but that is only from two of these wells. Usually the gravity of the oil is higher, the deeper the well is.

Re-Direct Examination

By Mr. Manster:

I had a degree in geology from Stanford University and I am a qualified petroleum engineer; and for two years after my graduation I spent two years on graduate work and got the degree of Petroleum Engineer at Stanford. I have been practicing my profession since April 1, 1922, during the whole of that time I have been employed by the State, starting out as a junior engineer and then advanced to Deputy State Oil and Gas Supervisor. I examined the well records and available Government reports on the Devil's Den area, and made a visit to the area recently, although I have gone through the area many times. I have formed an opinion as to the qualities of the Devil's Den area with respect to [107] the production of oil, and I think it is highly improbable that it will contain oil or gas in commercial quantities, so far as section 2 is concerned.

Mr. Blue: My objection goes to all, if the Court please, and an exception noted. (Tr. 674)

(Witness continuing)

In addition to the drilling of a dry hole, the considerations that would be taken into account, bearing upon the

(Testimony of Harold V. Dodd)

possibilities of finding oil in adjacent territory to the dry hole, would be the general character of the structures in the vicinity as indicated by surface outcrops, where these outcrops can be observed. I think the drilling of this particular well to 4270 feet was contributory evidence that the surface geology itself would indicate that it is highly improbable that the land would be of value for oil. From the geology alone it is highly improbable that oil in commercial quantities would be found in that section 2, and the drilling of the dry hole is merely contributory evidence. (Tr. 678)

Re-Cross Examination

By Mr. Blue:

I have been a witness for the Government or State four or five times and have never testified for a defendant as an expert. There is some difference between a Petroleum Geologist and a Petroleum Engineer, but the line is not very sharp, because the basic training is about the same. I do not feel that I am smarter than the average Petroleum Geologist, necessarily. There are some very fine geologists who come to California and do a splendid job of field exploration, identify the formations and the structure, but when they get through they don't have but a very hazy idea as to what they mean as far as oil development is concerned. I would have a hazy idea of geology if I had to go out and map it myself, but not [108] a very hazy idea after the field work has been done and presented in a workmanlike manner. I have never seen the field work done on Section 2 of the Devil's Den area, but I have seen Arnold structural maps of it. I do not place more credence in surface geology than in the drilling of an oil well, if the well is drilled right on

(Testimony of Harold V. Dodd)

the particular property that one is talking about. I examined the history and the core record of this Lube well. It is in the Taft office, in the Division of Oil and Gas, but before I came down here I did not examine it in detail. I examined the depth—no, I did not examine the core record itself at all. (Tr. 683) I know they ran casing into the well and made certain tests and were unable to bring the well in as an oil well. I believe it had some showings in it. I would not be surprised if there were actually three showings of an oil sand in that particular well because I think there were several quite extensive perforated intervals tested in the casing after it was cased and they were making their tests. (Tr. 683) I have never discovered any oil wells in my life. I have never made any reports, geological reports or petroleum engineer's reports to anyone. It is not permitted under Civil Service rules or under the departmental rules, and we are not permitted to take any outside fees or work of any kind. My work as a petroleum engineer for the past 22 years has been studying any geological reports in the area in which we are working, usually the United States Geological Survey reports because they are the most easily available, but we also have recourse to unpublished reports if the companies will let us look at them, and the records of the drilling. If the well penetrates some formation that looks as though it should be plugged in the process of abandonment, we have to keep tabs on what they penetrate, and [109] then we write our report and notices. I have never given, as a petroleum engineer, any written geological report or opinion. All a geologist does is to give his best guess. I guessed right about this Texas Company stuff in Section 24-28 in the Round Mountain Field. The shallow wells in the Devil's Den area have

(Testimony of Harold V. Dodd)

been producing ever since before the Division of Oil and Gas was established, and that Division was established in August, 1915. It is a general fact on producing wells that the longer a well produces, the less it produces.

Recross-Examination

By Mr. Cannon:

I said I guess right on the Round Mountain Field. I testified under oath at one time that it had no value as oil land, except for speculative purposes. I do not remember testifying before the Grand Jury in 1943 that no company would pay any more than \$2 an acre for that land, but I know that within two months after the testimony I gave that the Texas Company paid \$324.50 an acre for it. It was paid because someone in the Texas Company apparently made a mistake, and before a discovery was made in that vicinity. But they did discover oil in that vicinity after I gave my testimony, but not on that particular land. They discovered oil between the outside limits of the Round Mountain Field as I defined them in my testimony and the then known Round Mountain Field, but that does not mean anything. They brought in more than two producing wells; I think Bandini has three or four wells, and the Texas Company paid \$324 for this particular land after the oil was discovered within about a half a mile of the land, and they paid it for the territory that I condemned and that I still condemn. (Tr. 689) I have not made very many guess as to oil possibilities in any fields, because there [110] is no occasion for it. All of my geological work is not a guess. I cannot understand about the Round Mountain deal with the Texas Company, because the Texas Company has a very fine geologist there. He is a geologist, and I am a petroleum engineer,

(Testimony of Harold V. Dodd)

and he is an exploration geologist and ought to have known better. I do not think he is a petroleum engineer. I do not know whether or not the Texas Company's petroleum engineer is as capable as I am. I helped train him. He probably is as capable as I am. I did some reconnaissance work on Section 2 that we are talking about on June 29, 1944. I studied Arnold's Bulletin 398 in connection with the Devil's Den area. I have it in my office in Bakersfield. It is published by the United States Geological Survey, around 1908. That is the only geological report that I have studied on this area, except Bulletin No. 118 of the Bureau of Mines of California, which has a little article on it. I glanced through it, but I did not read it all. I took into consideration the matter set out in Bulletin No. 118, but my chief reliance was when I stood on that property and looked at both the south, northwest and southeast of it. I relied very slightly on Bulletin No. 118. (Tr. 700)

Re-Direct Examination

By Mr. Manster:

Many wells have been drilled in the San Joaquin Valley that have showings and which wells have later been abandoned as dry holes.

Recross-Examination

By Mr. Blue:

I have referred, in reaching my conclusions, to Bulletin 398 entitled, "The Geology of the Coalinga District, Arnold and Anderson". (Tr. 705) I refer just to [111] map and not to the Bulletin itself. Before coming to my conclusion that this particular property was improbable from the standpoint of producing oil. I only made an

(Testimony of Harold V. Dodd)

investigation from publications such as this. It takes a lot of time to chase down a fault, and it takes an experienced field geologist to do that. I do not claim to be such an experienced field geologist. (Tr. 715) I was on the property and could see the anticline in the Pyramid Hills to the north of this particular property. Quite frequently in the valley floor you have no outcroppings to inspect, to determine whether or not anticlines exist. I was on this particular property about fifteen minutes or so. It is 40 acres in extent. I did not make a survey or attempt to delineate boundaries. In addition to being on the property for about fifteen minutes, and in addition to looking at the contour map in Book 118 of the Division of Mines, page 498, I looked at Arnold's structure map, and by reason of those examinations I came to the conclusion that it was highly improbable that there was any oil there.

Re-Direct Examination

By Mr. Manster:

Even if this Lube well had been drilled deeper than 4270 feet, it is my opinion that it would be highly improbable that oil would be produced. I agree with Mr. Vancouvering, at page 500 of his article (Tr. 720) wherein he says that the productivity of the wells is so small as to be of minor importance, and which statement refers to wells drilled one-half to three-quarters of a mile from Section 2.

Recross-Examination

By Mr. Cannon:

In the same area that Vancouvering was talking [112] about, there is evidence that about 50 other wells were drilled.

(Testimony of Harold V. Dodd)

Q. Why, if you know, in your long experience in the oil business, why would they keep on drilling those wells if there was no probability of oil?

A. The whole area is sucker bait.

Q. Sucker bait?

A. Yes. Every inexperienced oil man who wants to make a million dollars and sees a little oil coming in out of a hundred seventy-five to five hundred feet depth, thinks he is going to make his fortune, and he goes in, and spends all the money he has got, and then passes it on to some other sucker. That has been going on for the last 20 years. (Tr. 722)

(Witness continuing)

That has been partly to my knowledge, and has been going on ever since I have been connected with the Division of Oil and Gas, and as an official of that Division I have done nothing to stop it. It is part of my duties to supervise the sealing up of these wells, and the granting of permits to drill. (Tr. 723)

Recross-Examination

By Mr. Blue:

By referring to "sucker bait" I had reference to the old Devil's Den Field, in which there were 50 or 60 wells drilled. It costs \$1500 to \$2000, I presume, to drill a 300 foot well. I do not know what the original production of those wells was over 30 years ago. There probably is not anybody that knows much about the early production of these wells. I know that Standard Oil Company and Richfield owned or leased some land in that area and drilled some wells north of these shallow wells.

(Witness excused.) [113]

PAUL JULIAN HOWARD,

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is Paul Julian Howard and I live in Bakersfield, and I am a petroleum engineer and listed as Chief Appraisal Engineer and Assistant County Assessor of Kern County. I have held that position for 8 years. I graduated from the University of California College of Mining, and majored in Petroleum Engineering, getting my degree in 1924. Since graduating in 1924, I worked for the first 4 years in refinery engineering and chemistry work, and have written a number of articles dealing with the geology of various oil fields in the San Joaquin Valley in northern California and have done work with geology in connection with valuation of oil fields. My chief duties as Chief Appraisal Engineer and Assistant Assessor of Kern County have to do with the valuation of the mineral lands in Kern County, and in connection with giving a valuation of metallic and non-metallic mineral deposits; and I supervise certain work of refineries and gasoline, and also help with the administration of the office.

Q. Now in pursuance of your official duties, did you make a valuation of the oil and mineral rights of that tract known as the northeast one-quarter of the northwest one-quarter, Section 2, township 25, south range 18-E in Kern County, California?

Mr. Cannon: I will object to that as being immaterial, and no foundation having been laid.

Mr. Manster: I am limiting it to 1939 at the time.

Mr. Cannon: I will object, then, on the further ground— [114]

Mr. Manster: I beg your pardon. It is 1938.

(Testimony of Paul Julian Howard)

Mr. Cannon: I will object, then, on the further ground that there is no issue in the indictment towards which this testimony would have the slightest probative value. We are not charged with selling land for something more than it was worth, nor making any false representations to any person as to its value. It is not part of the scheme alleged. (Tr. 728-729)

Mr. Manster: We maintain it is material on the allegations of the indictment which states that these defendants leased and assigned unproven and undeveloped properties.

Mr. Cannon: It does not go to the value. It goes to the proven or unproven.

Mr. Manster: We maintain, Judge, that the valuation of oil and mineral rights placed by the responsible State official who is charged with that function, is extremely relevant and material on the issue of whether this particular tract was proven and developed or not.

Mr. Blue: May I say something? Pardon me, Mr. Cannon. There is no witness that has appeared to justify any assumption that there was any representation made that this land was proven and/or developed.

Mr. Cannon: That isn't the point that I am making now.

The Court: That isn't the point." (Tr. 729) [114a]

* * * * *

Mr. Cannon: The point I am making now, Mr. Blue, is that there is no allegation here with respect to any part of the scheme having anything to do with the value of the land.

The Court: Well, only in connection with whether it was proven or unproven.

(Testimony of Paul Julian Howard)

Mr. Cannon: I say the assessed value.

The Court: If it were proven, I suppose it would have a higher assessed value.

Mr. Cannon: Probably.

The Court: You can limit it to what he based his valuation on.

Mr. Cannon: Of course, I will submit to your Honor's ruling, but reluctantly, and take an exception, and I would like the objection to stand as to this entire line of questioning covering this tract. (Tr. 729-730)

(Witness continuing)

I did not place any valuation on the mineral or oil rights of that particular tract. As of 1938, I have formed an opinion as to the nature and character of that tract of land with regard to its possibility for the production of oil in commercial quantities, and in my opinion it is unfavorable. In 1939 I did not make an evaluation of the oil and mineral rights of that tract in connection with [115] my official duties; nor did I for the 1938.

Cross-Examination

By Mr. Blue:

I had no value on Ten Sections Field for oil until the discovery was made (Tr. 733); prior to the discovery of oil there, there was no oil value demonstrated. The assessed value of Ten Sections Field today is somewhere around \$17,000,000. Prior to the discovery of the Paloma Field in reference to oil, there was no assessment made against the mineral rights there at all. Before the Ten Sections Field was brought in, I had no valuation there at all until after discovery, but I put valuation on other properties than where the actual discovery well was. I extended my limits out around there based on the

(Testimony of Paul Julian Howard)

geology as it was uncovered with the drilling operations, and included in my assessments what I considered were the limits of the field, and that is now assessed on the books at a value of \$17,000,000. The Ten Sections Field was discovered about 1938, and prior to the discovery of that field, there was no assessment at all placed on it for oil purposes. Probably half a dozen oil fields have been brought in since I have been on my job in Bakersfield; that is, in Kern County. Among them were the Ten Sections Field, the Greeley Field, the Canal Field, Cole's Levee Field. The approximate assessed valuation of the Cole's Levee Field is \$20,000,000 or \$21,000,000. It was brought in about 1938, and prior to discovery I did not place any valuation on it at all, for oil. Prior to the discovery of the Cole's Levee Field it was bare grazing land or alkali land. In 1938 there was no evidence to indicate that there would be a field at that particular place. Evidence was gained through geophysical exploration. There have been other structural highs shown [116] by the seismograph that have been drilled and have produced no oil. (Tr. 740)

Cross-Examination

By Mr. Cannon:

I went to work for the State in 1928. The seismographing of the Cole's Levee Field was done in 1932, and the results of that seismographing were known but I had no record of the picture, and even if I did have, the seismograph does not necessarily prove that there is oil there. It has not been our policy to place a valuation on any of these properties until there is something demonstrated to indicate some value, and until oil actually flows out of the ground.

(Witness excused.)

CHARLES H. SHOMATE,

a witness called by and on behalf of the Government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is Charles H. Shomate. I reside in Bakersfield, and I am the County Recorder, and have been so since January 8, 1923.

Q. By Mr. Manster: Mr. Shomate, did you make a search of the records during the period from December 1, 1938, to December 1, 1939, with reference to that tract known as the northeast one quarter of the northwest one quarter, Section 2, Township 25 South, Range 18 East, and from your records can you tell us who was the record owner of that property in that period?

Mr. Blue: Just a minute. I object, first, on the fact that when testifying as to records the records are the best evidence. [117]

Mr. Manster: We will produce them.

Mr. Blue: Second, that it is immaterial and not within the issues of the indictment. There is no allegation in the indictment that these defendants did not own anything that they transferred; therefore it is not within the realm of the indictment. (Tr. 743-744)

* * * * *

Mr. Cannon: * * * The other point is that the matter of record of ownership, as we all know, is not determinative of the actual owner. Until and unless someone calls in question the ownership of the property as between parties to an unrecorded document, the title actually stands in the person who owns it. In other words, the recordation statutes are nothing more than to

(Testimony of Charles H. Shomate)

give the world outside notice of ownership. As between the parties the title passes when the deed is delivered. (Tr. 745) [118]

Mr. Manster: With respect to this latter contention, our answer is that the testimony of this witness and the records will show that the defendant Gordon lost this property pursuant to a sale on execution first; subsequently, the materiality of this testimony is that the Union—that the Plymouth Company acquired 235,000 shares of stock for a tract of land or an exchange of a tract of land which the defendant Gordon purported to own but to which he had no title, having lost that title some two years previously. I think it is very material on the question of the assets of the Union Company, which surrendered 235,000 shares of stock for nothing at all, and the value of stock, of course, is intrinsically based upon the value of the assets of the company. (Tr. 745, 746)

Mr. Blue: If the Court please, and I say this in reference to the statement of the District Attorney and in furtherance of the objection, it is immaterial for this reason, that even if the record shows that there was on the records of the County Recorder a lien or a cloud on the title in the name of somebody else so that ostensibly on the records of the Recorder the property did stand in the name of somebody else, that is no evidence that the defendant Gordon and the other lessors in that certain document that is in evidence did not at that time own the property.

The Court: Well, it is some evidence that they did not.

Mr. Manster: We will show that this—

The Court: If they did they can show that they did. Go ahead. [118a]

(Testimony of Charles H. Shomate)

Mr. Cannon: Exception to the entire line of testimony. (Tr. 746)

(Witness continuing)

Between December 1, 1938, and December 1, 1939, M. E. Blynn was the owner of that property, and became the record owner of it on May 9, 1938.

Q. When did this individual, M. E. Blynn, become the record owner of this property?

Mr. Blue: I object to it on the ground that it is not the best evidence. The books are the best evidence.

The Court: He may answer.

Mr. Blue: Exception.

Q. By Mr. Manster: When did she become the record owner of that property?

A. On May 9, 1938.

Q. Can you tell us whether or not Mr. Fred V. Gordon owned any interest in this tract between the period December 1, 1938, and December 1, 1939?

Mr. Blue: I object on the ground it calls for the conclusion of the witness.

The Court: Well, according to his records.

Q. By Mr. Manster: According to your records?

A. No.

Q. Did he own any interest in the property, according to your records? A. No, no interest.

Mr. Manster: All right. Will you excuse me a minute, please, Judge?

(A document was handed by Mr. Manster to Mr. Blue.)

Mr. Manster: Will you stipulate to it?

Mr. Blue: I will stipulate it is a photostatic copy. I object to its materiality. [119]

(Testimony of Charles H. Shomate)

Q. By Mr. Manster: Did you produce a photostatic copy from your records with reference to the acquisition of ownership of this property by M. E. Blynn?

A. I did.

Q. Is this the photocopy to which you have reference?

A. (After examining) Yes, sir.

Mr. Manster: I offer it in evidence.

Mr. Blue: Objected to on the ground that no proper foundation has been laid, not as to the fact it is a photostatic copy, but the fact it is immaterial to the issues.

The Court: It may be received.

Mr. Blue: Exception.

The Clerk: 34.

(The document referred to was marked Plaintiff's Exhibit 34, and received in evidence.) (Tr. 747-748)

[PLAINTIFF'S EXHIBIT NO. 34]

This Indenture, made this Fourth day of May one thousand nine hundred and thirty-eight between Ed. Champness, Sheriff of the County of Kern, State of California, the party of the first part, and M. E. Blynn, a single woman, the party of the second part, witnesseth:

Whereas, by virtue of a writ of execution issued out of and under the seal of the Superior Court of the State of California in and for the County of Los Angeles, dated the 13th day of January, 1937, upon a judgment recovered in said court on the 13 day of November, 1935, in favor of Traders Oil Corporation, and against F. V. Gordon, to the said sheriff of the County of Kern directed and delivered, commanding him that out of the

(Plaintiff's Exhibit No. 34)

personal property of said judgment debtor in his County he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements, and real property belonging to the said judgment debtor on the day said judgment was recovered, or at any time afterward; and

Whereas, because sufficient personal property of the said judgment debtor could not be found whereof, he, the said sheriff, could cause to be made the moneys specified in said writ, he, the said sheriff, did, in obedience to said command, levy on, take and seize all the estate, right, title, and interest which the said judgment debtor so had of, in, and to the lands, tenements, real estate, and premises hereinafter particularly described, with the appurtenances, and did, on the 23 day of April, 1937, sell the said premises at public auction at the front door of the Kern County Jail in the City of Bakersfield, County of Kern, State of California between the hours of nine in the morning and five in the afternoon of that day, namely: at Eleven o'clock A. M., after having first given notice of the time and place of such sale by advertising the same according to law, at which sale the said premises were struck off and sold to the said *part* Traders Oil Corporation of the second part for the sum of Three thousand seven hundred fifty-seven and 09/100 Dollars, in lawful money of the United States, the said *part* Traders Oil Corporation of the second part being the highest bidder and said amount being the highest sum bid and the whole price paid for the same; and

(Plaintiff's Exhibit No. 34)

Whereas, the said sheriff, after receiving from said purchaser the said sum of money so bid as aforesaid, gave to them, the said *part* Traders Oil Corporation of the second part, such certificate of said sale as is by law directed to be given, and filed and recorded in the office of the County Recorder of the County of Kern, a duplicate of such certificate; and

Whereas, twelve months after such sale having expired without any redemption of the said premises, or any part thereof, having been made; Traders Oil Corporation, having assigned such Certificate of Sale, which transfer is recorder at the office of the Recorder of Kern County in Book 788 at page 306 of Official Records of said County.

Now This Indenture Witnesseth: That I, Ed. Champness, sheriff aforesaid and party hereto of the first part, by virtue of the said writ and in pursuance of the statute in such case made and provided, for and in consideration of the said sum of money above mentioned so paid as aforesaid by the said party of the second part, have granted, sold, and conveyed, and by these presents do grant, sell, and convey unto the said party of the second part and to her heirs and assigns, all the estate, right, title, interest, and claim which the said judgment debtor F. V. Gordon, had on the said 15th day of January, 1937, or at any time afterward, or now *have* of, in, and to the following described premises, viz.: All those certain lots, pieces or parcels of land, situate, lying and being in the County of Kern, State of California, and bounded and particularly described as follows, to-wit:

NE $\frac{1}{4}$ of NW $\frac{1}{4}$ and NW $\frac{1}{4}$ of the NW $\frac{1}{4}$, and N $\frac{1}{2}$ of the S $\frac{1}{2}$ of the NW $\frac{1}{4}$, all in Section 2, Township 29 South, Range 27 East, M. D. B. & M., all of Section

(Plaintiff's Exhibit No. 34)

2, Township 25 South, Range 18 East,—Except SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ thereof, All located in Kern County, California.

Together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in anywise appertaining.

To Have and to Hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part,—heirs and assigns, forever.

In Witness Whereof, the said party of the first part, as sheriff aforesaid, has hereunto set his hand the day and year first above written.

Ed. Champness

ED. CHAMPNESS

Sheriff of the County of
Kern, State of California.

Signed and Delivered in the)

Presence of)

H. H. Knott)

H. H. KNOTT)

State of California)

) ss.

County of Kern)

On this Sixth day of May, in the year one thousand nine hundred and thirty-eight, before me, Florence Moore, a Notary Public in and for the County of Kern, State of California, personally appeared the within-named Ed. Champness, Sheriff of the County of Kern, State of California, known to me to be the person described in and whose name is subscribed to the within instrument, and

(Plaintiff's Exhibit No. 34)

acknowledged to me that he, as such sheriff of said County of Kern, executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Kern, State of California, the day and year in this certificate first above written.

(Seal)

Florence Moore

My Commission Expires July 15, 1939.

Recorded at Request of Ed. Champness May-9-1938 at 30 min. past 3 P. M. in Book 794 of Official Records, Page 194 Kern County Records. Chas. H. Shomate, Recorder. By Frances Ahmann, Deputy Recorder. Checked By: M. Funk H 10263 Compared By: H. Mills.

State of California)

) ss.

County of Kern)

I, Chas. H. Shomate, County Recorder of said County, do hereby certify that the annexed is a whole, true and correct copy of an original, as will appear by reference to Book 794 of Official Records, Page 194, now in my office, and that said copy has been compared with original and is a correct transcript therefrom.

Witness my hand and official seal this 27th day of June, A. D. 1944.

(Seal)

Chas. H. Shomate,

Recorder in and for the County of Kern, California,

By Margaret Watts,

Deputy.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 34 in Evidence. Date Jul. 13, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Testimony of Charles H. Shomate)

(Witness continuing)

I made a search of my records and could not find thereon any lease in December, 1938, between Fred V. Gordon and wife and others to William S. Millener (Tr. 749), nor could I find any assignment or transfer of a lease in January of 1939 from Millener to the Union Associated Mines Company.

Cross-Examination

By Mr. Blue:

I made a search to determine whether or not that property since 1938 has or is now in the name of Fred V. Gordon and others, and I find a quitclaim deed recorded from M. E. Blynn to Fred V. Gordon on this property. There was a conveyance of the landowner's royalty to the Farmers & Merchants National Bank of Los Angeles. The quitclaim deed was filed in October, 1941, and runs from Mary Blynn to Fred [120] Gordon, it being dated October 30, 1941.

(The document was offered and received in evidence as Plaintiff's Exhibit 35.)

(Witness continuing)

I do not know anything about any of the facts except what appears on the records in the County Recorder's office.

(Witness excused.)

(At this point, Mr. Manster, one of the prosecution attorneys, read the following letters which are part of Government's Exhibit No. 16 in evidence:)

Mr. Manster: September 24, 1938, from A. P. (Tr. 751) Adkisson to J. A. Barclay, New House Building, Salt Lake City, Utah:

"Dear Mr. Barclay:

"Am enclosing clipping from Los Angeles Times of September 24, 1938, which is the opening gun of publicity to be used in connection with Union Associated Mines Company operations.

"Similar articles will appear Sunday, September 25, in the Los Angeles Examiner and Long Beach papers. On Monday an article will be published in the Wall Street Journal.

"Then open order I have you to purchase up to 5000 shares at one cent is perhaps to small an amount to bid for, therefore I will authorize you to change this to an open order, good until cancelled, for fifty thousand shares at one cent per share plus your commission.

"I will call you on the phone this evening to explain my departure.

"Yours very truly,

"A. P. Adkisson (s)

"A. P. Adkisson."

September 26, 1938, from J. A. Barclay to A. P. Adkisson:

"Dear Mr. Adkisson:

"Thanks for your favor of the 24th instant enclosing clipping which I was pleased to receive. (Tr. 752)

"Now, as regards the market—you are pushing it too quickly to get any stock at the low prices. We

have contacted all the possible sources here among the brokers but it has been so long dead they have not got any and have to look it up.

“Unless you want me to push it up to 2¢ bid, let me know, but my idea is to just let the price drag for a few days and if you could give me a list of the Utah stockholders I could work on them. That man, Ray, who was in Los Angeles, of course, started telling about the deal but I think I got that shut-off.

“I have two directors for you—one of them a contractor and the other a son of one of the brokers and will tell you about them when you get here.

“Now, as I understand your orders, they are to buy up to 50,000 shares @ 2¢.

“When are you going to return to Salt Lake? Am just asking this in order that I might start some publicity here and then again a list of stockholders outside of Utah ought to get a letter for some of those in the ‘know’ will be endeavoring to get them to sell their stock at the low prices when we want them to keep it.

“The market had the jitters today on account of Hitler’s speech but the opinion seems to be that (Tr. 753) he held out olive branch and that there may be no war. If this is correct, we should have a better market tomorrow.

“Kindest regards and good luck!”

A telegram, J. A. Barclay and Co. to Arthur J. Adkisson:

“No bids except ours—”

Mr. Evans: What is the date?

Mr. Manster: Pardon me. September 26, 1938:

“No bids except ours and no offers Working on two or three lots Wish had stock list

“J. A. Barclay and Co.”

From Barclay to Adkisson, dated September 27, 1938:

“Dear Mr. Adkisson:

“Thanks for your wire of today’s date as follows—

“‘John Clayton offered me by wire ten thousand shares Union Associated at one and one half please accept stock at that price for my account if he makes immediate delivery am notifying him to delivery to you’

“And confirm ours of this afternoon—

“‘Clayton presented one certificate 10,000 in name Weeks unwitnessed assessment payment not marked stop refused until made regular thousand certificates and necessary requirements stop your (Tr. 754) authority for us to accept necessary stop you stated Weeks would not sell’

“After sending above wire. Mr. Clayton came in and delivered the stock, eight one-thousands and one two thousand share certificates.

“In conversation, I asked why Weeks was selling and he said Weeks was not selling because he was out of town but this stock was laying around and he had an opportunity to pick it up. I told him that

if he would stop people from selling we would get this stock up to 5 to $7\frac{1}{2}$ and there was no sense in having people buy the stock @ $1\frac{1}{2}$ or 2ϕ .

"Mr. Clayton also said that *that* the stock book had been sent down for Mr. Bray to sign and the thought comes to me that you might send all the certificates to us and we will delay delivering them as long as we can, giving us time to work the market up.

"After Clayton left the office the first time, Mr. Morgan called me up and said that he was secretary of the company and that it was alright—that the certificates will be up in a few days but that was not sufficient for me to make delivery in the shape they were offered. All the certificates we have now have Assessment No. 8 stamped on them with the exception of one for 1,000 shares which they say they (Tr. 755) had checked and it was alright but to keep good friends thought it best to take a chance on that.

"I need a copy of the contract with the Plymouth Oil Company and should get this directorship straightened out as soon as possible in your best interests.

"Morgan is secretary, he tells me, and he is an attorney and that all means that he could not certify papers to the SEC registration. Am not trying to work you unnecessarily hard but these loose ends should be straightened out more particularly as under the old control there were so many loose ends and people knew it.

"Advise me of your plans and needs and will do our very best at this end for you know the writer just prides himself that 'service' is his middle name.

"With kindest regards!

"Cordially yours,

"J. A. BARCLAY & COMPANY." (Tr. 756)

Mr. Cannon: May I request that if counsel doesn't read all the letters—I don't care about reading them all, but will you so indicate.

Mr. Manster: I am reading all of them.

Mr. Cannon: Just so we will know.

Mr. Manster: I am reading the complete letters, Mr. Cannon.

September 28, 1938, from J. A. Barclay to Mr. A. C. Adkisson.

"Mr. A. P. Adkisson,

"Paul J. Marache and Co.

"6-50 South Spring St.

"Los Angeles, Calif.

"Dear Mr. Adkisson:

"Thanks for your favor of the 27th instant and as we understand it now, your orders are to buy 25,000 shares UNION ASSOCIATED MINES at $1\frac{1}{2}\phi$ but if any is offered at 2ϕ to take it.

"Will watch the Salt Lake papers for your publicity and today obtained a copy of the letter sent out by the Company boosting Mr. Mrogan. After read it, am reminded of the story of how the bartender in a saloon had given a man a drink who wanted to buy it on credit. The bartender called up to the proprietor and asked 'Is Jones good for a drink?' and Murphy

said, 'Has he had it?' The bartender said 'yes.' Then Murphy says, 'He's good.' (Tr. 757) It is the same way about sending *how* this circular. However, the main facts worth while about the company are quite impressive and when I get ahold of the list of stockholders outside of Utah will compile the facts as we see them and it may be more effective.

"You say that Messrs. Truman and Clayton will resign but as I have already stated to you, you cannot have a Secretary-Treasurer an attorney and certify any documents to the Securities & Exchange Commission.

"We note what you say about their deal on the 10,000 shares and your suspicions about the deal agree with mine. They were so anxious to get the money that afternoon that it gave me the impression that it was more personal than otherwise.

"Will endeavor to see Weeks and as soon as I get his address will call him up and tell him I would like to have a talk with him.

"Will keep you posted on any happenings and hope that you appreciate that my suggestions are solely in the interest of advancing the company and giving it a standing which we must all admit it did not have before.

"Must ask you to excuse my emphatic Scotch but I do like to see things go right and be done right when it comes more especially to obtaining confidence in a company like this which it did not have before.

"Hoping the market cheered you up today and with (Tr. 758) kindest regards and all good luck!

"Very truly yours,

"J. A. BARCLAY & COMPANY."

From A. P. Adkisson to J. A. Barclay, dated September 27, 1938.

"In reply to your letter of September 26th, relative to UNION ASSOCIATED stock:

"I quite agree with you that we are pushing the market too fast and so will instruct you to do as you suggested, that is to bid 1½ cents but if any is offered at 2 cents to take it. However, the amount was to be 25,000 shares.

"There was some publicity sent out from Los Angeles today that should appear in the Salt Lake papers this evening or tomorrow. We will furnish more presently.

"I talked to Morgan about putting on some new directors to replace Truman and Clayton and he agreed it was the thing to do. Will be happy to talk to you about the gentlemen you suggested. If they meet your standards I am sure we will approve, so no trouble there.

"This will be your authority to accept the Clayton stock as ordered. We talked to Morgan on the phone as soon as your telegram arrived and asked him what the hell Weeks and Clayton were cooking up. He explained that one of their friends, who had 15,000 shares to sell had it all in one certificate and as they had no one (Tr. 759) to sign the new certificates they had accomodated him by lending him a certificate belonging to Weeks, so he could deliver the 10,000 shares. Seemed satisfactory to us so it's okay to accept, but we let them know we were watching them. I am sure that Weeks won't sell, however, if you have an opportunity I would like to have you talk to him.

"Morgan is supposed to have a letter out to the stockholders today or tomorrow. Will you please ask him to send you as many as you feel you will need.

"I do not know just when I will get back to Salt Lake but feel we are in good hands with you and if anything important comes up I can be there in a few hours and also I want you to feel free to phone or wire me any time 'collect' or send me an account of the charges.

"Thanks for your advice in these matters and feel free to give us your opinion at any time. With Best Wishes,

"Sincerely yours,

"Arthur P. Adkisson."

Next, a letter from J. A. Barclay to A. P. Adkisson, dated September 29, 1938.

"Dear Mr. Adkisson:

"Thanks for your favor of the 28th instant and note that you are sending copy of the contract with the Plymouth Oil Company.

"Nothing came of our offer of the stock today but (Tr. 760) in face of the facts that there were several inquiries did not desire to say that there were no offerings but rather give them a quotable market. If they had accepted the offer, then we would have been in a position of getting behind the market so that if any decent block came on higher than your limit at which to buy we would be in a position to take it. In other words, it would be a support behind the market which would engender confidence.

"Thank you for your check in the sum of \$162.50 in settlement of the purchase of 10,000 shares UNION ASSOCIATED MINES COMPANY and we are forwarding you the certificates under registered cover.

"You will notice that as we stated in our previous letter, one of the certificates does not have Assessment No. 8 stamped on it but Clayton assured us that the assessment had been paid.

"We will keep you posted and endeavor to handle the market so that investors will gradually acquire not only interest but confidence.

"With kind regards!

"Very truly yours,

"J. A. BARCLAY & COMPANY."

From J. A. Barclay to Mr. A. P. Adkisson, dated September 30, 1938.

"Dear Mr. Adkisson: (Tr. 761)

"Was pleased to talk with you over the telephone today although there was really nothing new as regards the market.

"There are no offerings here and there have been no buyers outside of ourselves over 1¢.

"In talking with Mr. Marache, promised to send him copy of a letter which we believe would be of help to send out not only to the stockholders but some of our own people.

"We do not want to talk about the past but paint the picture of the future and would like a copy of the contract and also would like to say, if you have no

objections that the control of the company is now owned by California people.

"Another thing, think it is advisable to say that it is the intention of the management to make application to the Salt Lake Stock Exchange to restore the listing.

"Am an optimistic within the bounds permitted by the Securities & Exchange Commission.

"Understand from Mr. Morgan that Mr. Weeks will be here Monday and intend if possible to get in touch with him and have a chat.

"Will call you up on anything worthwhile, and with best wishes, I am

"Very truly yours,

"J. A. BARCLAY." (Tr. 762)

From J. A. Barclay to A. P. Adkisson, dated October 1, 1938.

"Dear Mr. Adkisson:

"There have been quite a few inquiries around the market for UNION ASSOCIATED and we closed it 3¢ bid at 3½¢ today. Most of the inquiries came from California.

"BULLION MINING, which is another property interested in California oil lands, closed 7¢ bid.

"Will support the market at this end and it looks as if the price is now coming up to a figure justified to a certain extent by the interest in the Company.

"With kind regards!

"Very truly yours,

"J. A. BARCLAY."

From J. A. Barclay to A. P. Adkisson, dated October 3, 1938:

"Dear Mr. Adkisson:

"Thanks for your favor of the 1st instant and we appreciate your confidence.

"There was no trading today on UNION ASSOCIATED and we quoted the market 3 at $3\frac{1}{2}\phi$.

"This morning, Mr. Orton called to see me and stated that the stockholders' list was in pretty bad shape and it would take him time to get it straightened out so as to furnish me with a correct list.

"Mr. Weeks was in Ogdon this morning, was expected (Tr. 763) in our city before night but as yet Mr. Morgan has not informed me of his arrival. Just as soon as we get all the different things straightened out, will endeavor to get in touch with the stockholders and several on our own mailing list and will avoid using the word 'control' but can state that 'oil interests in California are well represented.'

"By the way, you promised to let us have a map of the properties. If you have a spare one, would like you to send it on and expect you to keep us posted as to when drilling is started and various other developments from time to time.

"Appreciating your cooperation in the one common object . . . to get the investing public to realize that UNION ASSOCIATED stock has a future.

"Very truly yours,

"J. A. BARCLAY & COMPANY."

From A. P. Adkisson to J. A. Barclay, dated October 1, 1938. This is a little out of chronological order:

"Dear Mr. Barclay:

"Glad you had opportunity to talk to Mr. Marache about the market there in Salt Lake. He said you were handling it perfectly which pleased me for I have been telling him that we were in proper and experienced hands at that end.

"We have just started to talk to our friends here (Tr. 764) and were under the impression that there should have been orders for approximately 30,000 shares at three cents.

"Am writing Morgan to furnish you with stockholders list so that you may mail the letter you are getting out concerning the company.

"Also enclosed you will find copy of agreement which I promised you.

"Have discussed the matter of your letter concerning company with the men here. At present they do not think it advisable to mention that control has passed to California people but think telling them we will make application to list stock an excellent idea.

"Thanks again for your very nice letters, they keep us well informed. Also appreciate your frankness of opinion which we consider of great value.

"Cordinally yours,

"Arthur P. Adkisson.

"P.S. Since writing the above have further discussed the question of saying control was now in the hands of California people. We have decided that if you think it advisable that it will be alright with us. In other words use your own judgment. Our only

thought was the word 'control' scares some people. However, we can see the merit of telling them of a new management that we hope will be infinitely more successful than formerly." (Tr. 765)

From A. P. Adkisson to J. A. Barclay, dated October 3, 1938:

"Dear Mr. Barclay:

"This will acknowledge receipt of your letter dated September 29, 1938, containing the following certificates UNION ASSOCIATED MINES CO. stock: Nos. 2326 (1000), 2345 (1000), 3049 (1000), 3021 (1000), 3022 (1000), 3027 (1000), 3023 (1000), 3026 (1000), and 2967 (2000).

"The following telegram addressed to me was received from John Clayton this morning, quote, 'Market here cleaned up. Think prices climbing too fast if price gets too high outside stock will come in and cause severe drop. Feel advisable for me to write outside stock and offer 3 cents (or whatever you think best). This would give better control of market—signed John Clayton.'

"Am enclosing copy of my letter in answer to Claytons' telegram. I hope it meets with your approval.

"Wrote Morgan Saturday asking him to see that you were furnished with a copy of the stockholders list as prepared by Mr. Orton, the accountant.

"We are well pleased with your work at that end. If we can assist you in any way please call us.

"Sincerely,

"Arthur P. Adkisson."

From A. P. Adkisson to Mr. John Clayton, dated October 3, 1938. (Tr. 766)

"Dear Mr. Clayton:

"Your telegram relative to the market on Union Associated received, and duly appreciated. However, since Mr. Barclay has been appointed to take care of the market situation, I believe all questions concerning same should be referred to him directly.

"This doesn't mean that you should not deal in the stock yourself. It would seem to me that you, working in conjunction with him, would have better support and a thorough knowledge of what is going on locally.

"While the market is showing good strength as far as price is concerned we do not feel the price is out of line commensurate with the activities of the company.

"The activities around the general area where the 70 acre lease is held are considerable and would indicate that the general trend is toward this lease. A piece of property of this size, proven up, would be of tremendous value to the stock. As for our Torrance lease of course it is generally conceded that we can't miss a well.

"We expect to furnish you, very shortly, with a geological report from one of our leading geologists, on the 70 acre piece, which should leave very little doubt as to the value of this lease to the company.

"Will appreciate anything you can do to help Mr. Barclay and incidentally you should be in a position to do quite a little business for yourself. (Tr. 767)

"With kindest regards to you and Judge Morgan.

"Cordially yours,

"Arthur P. Adkisson."

From J. A. Barclay to A. P. Adkisson, dated November 18, 1938.

"Dear Mr. Adkisson:

"Thanks a lot!

"It is just wonderful the speed in which you are putting that well down and I think everyone here is like you are in Los Angeles—awaiting for the drill to strike the pool of black gold before they do anything in the stock.

"Morgan got out a circular today to the stockholders. It was alright and will keep them from selling even if it does not mean buying orders.

"With best wishes, I am

"Very truly yours,

"J. A. BARCLAY & COMPANY"

From J. A. Barclay to A. P. Adkisson, dated November 22, 1938:

"Dear Mr. Adkisson:

"Thanks for your wire!

"Our market was just dead today in everything as you will note from the enclosed quotation sheet.

"In the case of UNION ASSOCIATED—there was not a buying order nor a selling order in the market. I canvassed every possible channel and no broker had an order of any description.

"Will watch it closely for you, although tomorrow is likely to be just as dead as today but will do my best to help you.

"Kind regards,

"Very truly yours,

"J. A. BARCLAY & COMPANY"

From J. A. Barclay to A. P. Adkisson, dated December 2, 1938:

"Dear Mr. Adkisson:

"Many thanks for your wires relative to the well. I have endeavored to use them to good advantage but the discouraging feature has been that offers of stock are coming from your end. Was offered 10,000 shares yesterday @ $2\frac{1}{2}\phi$ and the same amount today. A little buying from your end would change the aspect here, even though the rest of our (Tr. 769) market is practically dead.

"I think you people have done wonders and some day we will all get our innings.

"Very truly yours,

"J. A. BARCLAY & COMPANY."

From J. A. Barclay to A. P. Adkisson, dated December 9, 1938:

"Dear Mr. Adkisson:

"I want to congratulate you upon the messages the Plymouth Oil Company are sending to the Stock Exchange.

"These messages would be most effective in making people become *interest* in UNION ASSOCIATED MINES COMPANY were it not for the fact that when every time a wire is received there also comes selling orders out of your end and you know that just kills the whole picture for if the controlling parties do not show an interest in the upward movement, what do you expect others to do?

"Very sorry to see this as from your experience in the stock business you can figure the *affct* it has psychologically.

"Very truly yours,

"J. A. BARCLAY."

From J. A. Barclay to A. P. Adkisson, dated December 29, 1938: (Tr. 770)

"Dear Mr. Adkisson:

"Acknowledging your favor of the 28th instant, and in reply would say that you are no more disappointed in UNION ASSOCIATED than I am. It is difficult for we people here to understand the situation, for instead of the stock going up as it should have, there has been a continuous flow of stock from your end. However, it may be that in time the well will work out to the salvation of the stockholders.

"As regards selling the stock @ $2\frac{1}{2}\phi$ —it is impossible to do so as the last sale here was 10,000 shares yesterday @ $1\frac{1}{2}\phi$. If you wish to, however, I think I can sell 20,000 shares @ 1ϕ , and if you wish to do this, wire me the first thing tomorrow morning.

"Of course, you are probably disappointed in this price but the way things look no one here wants to bid for it.

"Mr. Morgan has been in Los Angeles for about a week now and none of us have heard anything and with continuous selling from Los Angeles confidence has been broken.

"Appreciating your good wishes, and sorry I cannot send you a more inspiring reply.

"Sincerely,

"J. A. BARCLAY." (Tr. 771)

From J. A. Barclay to A. P. Adkisson, dated December 30, 1938:

"Friend Adkisson:

"Acknowledging your wire of yesterday, which arrived after we had left the office, and today's wire, as follows:

" 'In new deal Union will see take care of you'

" 'Could not make delivery at your price. Morgan returns tonight. deal all complete Derrick erected for second well. No sales coming from our people here. regards'

"We were especially gratified to get today's wire as there has been such an absence of information that while, I have faith in the outcome of your operations, the public lost interest, and this, together with the stock which had been selling, cause the decline. Now, that Mr. Morgan will be here, he will probably make all the information available to us, and we can get a more correct viewpoint.

"The company suffered first from its past reputation and then next from the continued offering of stock coming from your end. As far as we could trace, there has been little local stock sold and the offerings mainly came from the wirehouses.

"With a clear situation as to the future we (Tr. 772) can get to work and get the stock higher provided the supply will dry up, and rest assured that I will cooperate to this end. I want to see it listed and the company can gradually gain confidence of investors to a point where demand will exceed the supply and bring about a rising market.

"Well, we are now at the end of 1938 and next week we will begin the new year. It looks to me

that it holds plenty of promise for prosperity and my wish is that it will come to you in large measure.

“Cordially and sincerely,

“J. A. BARCLAY.”

From A. D. Adkisson to J. A. Barclay, dated December 28, 1938:

“Dear Mr. Barclay:

“Thanks very much for your letter of the twenty second with your kind thoughts and wishes. Sorry to have been tardy in answering but you know how those things are this time of the year.

“Have been quite keenly disappointed in the way Union Associated Stock has acted and probably we will have to pay a dividend or bring in another well before the stock will show any signs of life.

“We really have a nice well and with the drainage we have should produce a lot of oil. The well cost approximately forty thousand dollars so the Unions (Tr. 773) interest is really worth while.

“I would like to ask you to do me a personal favor. I’ve ten thousand shares that I would like to get 2 cents for and if you could do this for I would be very much indebted to you.

“You can still reach me thru Marache and Co. I just happen to write this from the office of a friend.

“Thanks again for your best wishes and assuring you that I wish you a very happy and prosperous New Year I am

“Very Sincerely

“A. P. Adkisson (s)

“P. S. Will certainly appreciate it if you can place this stock for me.

“APA.” (Tr. 774)

IDA APPERSON,

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Mrs. Ida Apperson. I turned in some property and bought some stock of Union Associated Mines Company. I live in Los Angeles.

(Witness excused.) [121]

At this point, Plaintiff's Exhibits as follows were offered and received in evidence, each being a printed form letter:

Exhibit No. 3. Letterhead of Union Associated Mines Company, undated, directed "TO THE STOCKHOLDERS OF THE UNION ASSOCIATED MINES COMPANY:"

Exhibit No. 4. Letterhead of Union Associated Mines Company, dated January 6, 1939, addressed "To the Stockholders of Union Associated Mines Company:"

Exhibit No. 5. Letterhead of Union Associated Mines Company, dated August 1, 1939, addressed "To the Stockholders of Union Associated Mines Company:"

There was also offered and received in evidence without objection Plaintiff's Exhibit No. 36, certified copy of the Articles of Incorporation of Plymouth Oil Company.

[PLAINTIFFS' EXHIBIT NO. 36.]

State of California—ss

I, Edwin M. Daugherty, Commissioner of Corporations of the State of California, do hereby certify that the following are true and correct copies of the documents described below, in the matter of Plymouth Oil Company, as the same are now on file and of record in my office:

Permit issued June 7, 1939;

Permit issued September 19, 1938;

Order Approving Escrow Holder issued December 12, 1938;

Certified copy of Articles of Incorporation, attached as Exhibit "A" to application filed August 26, 1938.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 4th day of April, 1941.

EDWIN M. DAUGHERTY

Commissioner of Corporations

By J. A. HAHN

J. A. HAHN

Assistant Commissioner

Before the

Department of Investment

DIVISION OF CORPORATIONS

of the

State of California

In the matter of the application of

PLYMOUTH OIL COMPANY

for a permit authorizing it to sell and issue its securities

(Plaintiff's Exhibit No. 36)

PERMIT:

File No. 68096LA

Receipt No. LA 6256

This Permit Does Not Constitute a Recommendation or
Endorsement of the Securities Permitted to be
Issued, but is Permissive Only

PLYMOUTH OIL COMPANY,

a California corporation, is hereby authorized to sell and
issue its securities as hereinbelow set forth:

1. To assign, set over, and transfer to John McKeon
a 10 per cent operating interest in all oil, gas, and
other hydrocarbons which may be produced and
saved from the real property described in the ap-
plication, for the consideration and in the manner
set forth in said application, upon conditon that ap-
plicant execute and deliver as evidence of owner-
ship thereof, an assignment substantially in the
form submitted May 26, 1939 and marked Exhibit
"C".

This permit is issued upon each of the following con-
ditions:

(a) That the assignment authorized to be executed and
delivered by paragraph 1 hereof shall not be executed and
delivered unless and until the applicant first shall have
selected an escrow holder and said escrow holder shall have
been first approved in writing by the Commissioner of
Corporations; that, when executed and delivered, the roy-
alty assignment evidencing the ownership of the operat-

(Plaintiff's Exhibit No. 36)

ing interest herein authorized to be sold, shall be forthwith deposited with said escrow holder, to be held as an escrow pending the further written order of the said Commissioner; that the receipt of said escrow holder for said royalty assignment shall be filed with said Commissioner; and that the owner or persons entitled to said interest shall not consummate a sale or transfer of said interest, or any part thereof or any interest therein, until the written consent of said Commissioner shall have been obtained so to do.

(b) That unless revoked, suspended or extended by alteration or amendment, upon application filed on or before the date of expiration specified in this condition and upon such terms and conditions as the Commissioner may deem proper, all authority to sell securities under issuance clause 1 of this permit shall terminate and expire on the 29th day of November, 1939. All other issuance clauses and/or conditions of this permit shall remain in full force and effect until revoked, suspended, altered or amended by appropriate order of the Commissioner.

Dated: Los Angeles, California

June 7, 1939

(Seal)

EDWIN M. DAUGHERTY

Commissioner of Corporations

By J. A. HAHN (Signed)

J. A. HAHN

Deputy

AFH:VB

(Plaintiff's Exhibit No. 36)

Before the
Department of Investment
DIVISION OF CORPORATIONS
of the
State of California

In the matter of the application of

PLYMOUTH OIL COMPANY

for a permit authorizing it to sell and issue its securities

PERMIT

File No. 68096LA

Receipt No. LA 6256

This Permit Does Not Constitute a Recommendation or
Endorsement of the Securities Permitted to be
Issued, but is Permissive Only

PLYMOUTH OIL COMPANY,

a California corporation, is hereby authorized to sell and
issue its securities as hereinbelow set forth:

1. To sell and issue to the persons named in the application an aggregate of not to exceed, to any or all of them, 1,000 of its shares, at par, for cash, lawful money of the United States, for the uses and purposes recited in the application and so as to net applicant the full amount of the selling price thereof.

This permit is issued upon each of the following conditions:

- (a) That none of the shares authorized by paragraph 1 hereof shall be sold or issued unless and until the applicant first shall have selected an escrow holder and said

(Plaintiff's Exhibit No. 36)

escrow holder shall have been first approved in writing by the Commissioner of Corporations; that, when issued, all certificates evidencing any of said shares shall be forthwith deposited with said escrow holder, to be held as an escrow pending the further written order of the said Commissioner; that the receipt of said escrow holder for said certificates shall be filed with said Commissioner; and that the owner or persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, until the written consent of said Commissioner shall have been obtained so to do.

(b) That unless revoked, suspended or extended by alteration or amendment, upon application filed on or before the date of expiration specified in this condition and upon such terms and conditions as the Commissioner may deem proper, all authority to sell securities under issuance clause 1 of this permit shall terminate and expire on the 17th day of December, 1938. All other issuance clauses and/or conditions of this permit shall remain in full force and effect until revoked, suspended, altered or amended by appropriate order of the Commissioner.

Dated: Los Angeles, California

September 19, 1938

(Seal)

EDWIN M. DAUGHERTY

Commissioner of Corporations

By J. A. HAHN (Signed)

J. A. HAHN

Deputy

HVW:MGD

(Plaintiff's Exhibit No. 36)

Before the
Department of Investment
DIVISION OF CORPORATIONS
of the
State of California

In the matter of the application of

PLYMOUTH OIL COMPANY

for a permit authorizing it to sell and issue its securities

ORDER APPROVING ESCROW HOLDER

File No. 68096LA

R. A. Dunnigan Attorney at Law, of Los Angeles, California, having been designated by applicant as Escrow Holder under the permit heretofore issued to applicant on the 19th day of September, 1938, and all other permits and amendments and supplements thereto.

It Is Ordered that said R. A. Dunnigan be and he is approved as such Escrow Holder.

Dated: Los Angeles, California

December 12, 1938

(Seal)

EDWIN M. DAUGHERTY

Commissioner of Corporations

By RONALD H. LOENHOLM (Signed)

RONALD H. LOENHOLM

Deputy

HVW:EM

(Plaintiff's Exhibit No. 36)

Frank C. Jordan
Secretary of State

STATE OF CALIFORNIA
DEPARTMENT OF STATE

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 19th day of August, 1938.

FRANK C. JORDAN (Signed)

Secretary of State

By CHAS. J. HAGERTY (Signed)

Deputy

(Great Seal of the State
of California)

[Exhibit "A".]

(Stamp)

Endorsed

Filed

In the office of the
Secretary of State of
the State of California

Aug 19 1938

(Plaintiff's Exhibit No. 36)

Frank C. Jordan
Secretary of State

By Chas. J. Hagerty
Deputy

ARTICLES OF INCORPORATION
OF
PLYMOUTH OIL COMPANY

Know All Men by These Presents:

That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California,
And We Hereby Certify:

First: That the name of the corporation shall be
PLYMOUTH OIL COMPANY,

Second: The purpose for which said corporation is formed are:

- (a) To carry on the business of producing, acquiring, buying, selling and otherwise disposing of and turning to account and dealing in petroleum of all grades, natural gas, asphaltum, bitumen and bituminous substances of all kinds, carbon and hydrocarbon products of all kinds, coal, gold, silver, iron, copper and all other minerals and metallic substances, and in general subsoil products and surface deposits of every nature and description.
- (b) To prospect, explore, drill for, discover, survey, extract, produce, mine, mill, separate, convert, smelt, refine, reduce, treat, manufacture, store or otherwise turn to account, sell, deal in, transport

(Plaintiff's Exhibit No. 36)

through pipe lines, in vessels or otherwise on land or water, though not for public service, each and every of the substances specified in subdivision "(a)" hereof, either in its natural form or in any altered, manufactured or refined form.

- (c) To acquire by purchase, lease or otherwise, and to own, sell, lease, mortgage, convey, develop, improve and operate in any state of the United States or in any territory, colony or possession of the United States, or in the District of Columbia, or in any foreign country, any and all lands, leases, options, concessions, grants, land patents, franchises, rights, powers and privileges which the corporation may deem wise and proper in connection with the conduct of the business hereinbefore referred to.
- (d) To buy, sell, own, mortgage, hypothecate, and/or deal in the stocks and bonds of other corporations.
- (e) To purchase, lease or otherwise acquire, use and operate, care for and dispose of, any plant or plants which may be used for or useful in connection with any such business as hereinabove specified, whether now established or hereafter to be established, and any and all property and good will connected therewith, and also any wells, machinery, appliances, tools, supplies, materials, and other real or personal property rights and privileges of any character whatsoever suitable, convenient or necessary for any of the purposes aforesaid, or which can lawfully be used in connection therewith; and also to do any other similar or different business or thing incidental to or which may lawfully and conveniently be done in connection with any of the matters aforesaid.

(Plaintiff's Exhibit No. 36)

(f) To have offices, conduct its business and/or promote its objects within and without the State of California, in other states, the District of Columbia, the territories and colonial dependencies of the United States, and in foreign countries, without restrictions as to place or amount.

(g) To buy, sell, own, mortgage, hypothecate, lease and/or deal in real and/or personal property of any and all kinds and character.

Third: The principal office for the transaction of the business of the corporation shall be located in the County of Los Angeles, State of California.

Fourth: That the amount of the capital stock of said corporation is one million shares of Ten (10¢) cents par value, and the aggregate par value of \$100,000.00.

Fifth: The total number of shares of stock of this corporation actually subscribed is One Thousand (1000) shares. The names of the subscribers to said stock, and the number of shares respectively for which they have subscribed, and the amount to be paid by them for such shares are as follows:

Fred V. Gordon	400	\$40.00
Sidney Fischgrund	400	\$40.00
Guy B. Davis	200	\$20.00

Sixth: The number of the directors of the corporation shall be Three (3), and the names and addresses of the persons who are appointed to act until the first annual

(Plaintiff's Exhibit No. 36)

meeting of shareholders, or until the selection and qualification of their successors, are as follows:

Fred V. Gordon	Los Angeles, California
Sidney Fischgrund	Los Angeles, California
Guy B. Davis	Los Angeles, California

In Witness Whereof, we, the undersigned, being all of the directors herein named have hereunto set our hands this 17th day of August, 1938.

(Signed) FRED V. GORDON

“ SIDNEY FISCHGRUND

“ GUY B. DAVIS

State of California

County of Los Angeles—ss.

On this 17th day of August, 1938, before me the undersigned, a notary public in and for said county and state, personally appeared Fred V. Gordon, Sidney Fischgrund and Guy B. Davis, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Witness my hand and official seal.

(Signed) R. A. DUNNIGAN

Notary Public in and for said
County and State.

(Notarial Seal)

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 36 in evidence. Date Jul. 14, 1944. E. U. Frankenberger, Deputy Clerk.

[Endorsed]: Filed May 11, 1945. Paul P. O'Brien, Clerk.

Mr. Manster: We have here several checks signed by the Plymouth Oil Company by Fischgrund and Davis.

Mr. Blue: We have no objection to the foundation, but we object to the materiality of it.

Mr. Manster: With reference to the materiality, these checks, 7 checks commencing with October 7, 1938, and extending to December 22, 1938, are made payable to R. R. Bray, which the record shows was the president of the Union Associated Mines Company, and all these checks are issued by the Plymouth Oil Company and signed by Sidney Fischgrund and Guy B. Davis.

We maintain it shows a connection between the Union and the Plymouth Company, and is material on the question of control by the Plymouth Company over the Union Company. It shows payment by the Plymouth Company to an officer of the Union Company.

The Court: Well, they may be received.

Mr. Blue: Exception. (Tr. 785-786) [122]

* * * * *

Mr. Cannon: It can go in the same exhibit. That one is for \$50 to Collins, and that is the only check that Plymouth gave him, so far as you know, isn't it?

Mr. Manster: So far as I know.

(The document referred to was marked as Plaintiff's Exhibit No. 37 and received in evidence.) (Tr. 786)

At this time the following exhibits were offered and received in evidence:

Plaintiff's Exhibit No. 38. Photocopy of contracts between Plymouth Oil Company and Standard Oil Company of California with reference to purchase of oil from Plymouth wells Nos. 1 and 2; photocopies of two letters

signed by Sidney Fischgrund and Guy B. Davis, addressed to Standard Oil Company of California, having to do with the distribution from the proceeds to be received by the Plymouth Oil Company for the payment of oil from those two wells.

Plaintiff's Exhibit No. 39. Photocopies of records from Standard Oil Company showing the aggregate production of oil from Plymouth wells Nos. 1 and 2, by month, in barrels, and the value or price, and the payments made to Plymouth Oil Company and Union Associated Mines Company, and to the landowners for their royalties, up to and through December, 1939.

Plaintiff's Exhibit No. 40. Plymouth Oil Company record showing the daily pumpers' reports on wells Nos. 1 and 2, up to December, 1939; also the gauge, or the tank gauge scale, for computing the barrel production on the basis of the depth of oil in the tank.

Plaintiff's Exhibit No. 41. Duplicate of report [123] filed by Plymouth Oil Company with the Division of Oil and Gas of California, showing the initial production of Plymouth Wells Nos. 1 and 2.

LEWIS J. HAMPTON,

called as a witness by the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Lewis J. Hampton and I live in Los Angeles and I am a stockholder of the Union Associated Mines Company.

At this point 4 checks drawn by the witness, bearing Nos. 1025, 1019, 1031, and 1032, delivered to John

(Testimony of Lewis J. Hampton)

McEvoy and charged to the account of the witness, and each of which checks bears the endorsement of Mr. McEvoy, but of none of the defendants, were offered and received in evidence, as Plaintiff's Exhibit No. 42, and 10 stock certificates of Union Associated Mines Company, bearing the following numbers: No. 3397, 3396, 4066, 4068, 4069, 3808, 3807, 3806, 3805, 3851, each for 1,000 shares, and 5 of which are in the name of R. A. Dunnigan and endorsed by him in blank; 3 of them in the name of I. Hansen, endorsed in blank; and 2 in the name of A. A. Julian and endorsed in blank; were offered and received in evidence as Plaintiff's Exhibit No. 43, the said Exhibits Nos. 42 and 43 being offered and received under the following circumstances:

Mr. Cannon: * * * I stipulate no further foundation need be laid for them, but I object to them on behalf of all of the defendants on the ground that they are hearsay as to them and have no probative value in the case.

The Court: They may be received.

Mr. Cannon: Exception. (Tr. 794) [124]

Mr. Cannon: At this time I will stipulate on behalf of all the defendants that no further foundation need be laid so far as the stock certificates themselves are concerned, but I object to the offer, if there be an offer in evidence, on the ground that they are hearsay as to each and all of the defendants in this case.

Mr. Evans: I offer them at this time.

The Court: They may be received.

Mr. Cannon: Exception. (Tr. 795)

(Testimony of Lewis J. Hampton)

(Witness continuing)

The four checks, Exhibit No. 42, total \$350.00 and were given by me to Mr. McEvoy for stock that I purchased in Union Associated Mines. The stock was bought about the dates of those checks. I know the defendant Collins, and I met him, Murphy, Siens, and Bray, at the office of the Plymouth Oil Company in Los Angeles. McEvoy called at my house first, a short time before the first check was issued, shortly prior to January 16, 1939.

Mr. Cannon: If the Court please, may I have a running objection to any conversations had between this witness and anyone else who is not a defendant in this case?

The Court: Yes.

Mr. Cannon: May it be understood that an exception is taken to your Honor's ruling allowing the evidence to go in?

The Court: Yes. (Tr. 797)

(Witness continuing)

I also met Mr. Fischgrund in the office of the Plymouth Oil Company. (Tr. 798)

Q. Tell us what happened on the occasion of your call at the Plymouth Oil Company offices. [125]

A. Well, they told me they had plenty of finances—

Mr. Cannon: I will object on the ground it is too general, if the Court please.

The Court: Who was telling you this?

The Witness: Mr. Collins. He said they had unlimited funds.

* * * * *

(Testimony of Lewis J. Hampton)

A. Well, of course, Collins and McEvoy did most of the talking. They presented the case. They presented the situation that they had a 50 per cent interest in these wells with no deductions, and that they had plenty of money back of it to drill all the wells that they wanted to drill if it was not wild cat, and this company would share in 50 per cent of the earnings. (Tr. 798-799)

(Witness continuing)

By "this company" is meant Union Associated Mines Company. They told me where the wells were located in the Torrance Field, and I bought some stock on this occasion but I did not get the delivery of it right away. McEvoy brought the stock to my house. On the second trip to the office, it was practically the same thing, and I bought some stock again. I did not have any conversation with Fischgrund, to any extent, it was mostly with Collins, McEvoy and Murphy. I went to the Plymouth offices alone, the first couple of times, but later I was there with Dr. Williams and Mr. Peet. I think Williams and Peet were there on two occasions, and at the same time Collins and McEvoy were there. On the second visit to the office, it was reported by Collins and McEvoy to be producing 350 barrels. I did not make any trips to the Torrance Field myself. The statement that the Plymouth Well No. 1 was making 350 barrels was repeated in the presence of [126] Williams and Peet. I was asked to come to the Plymouth, and met Mr. Barclay. McEvoy asked me to call at the office. This was after I had bought the first two blocks of stock, and I waited there several hours to meet Barclay, and quite a number of other gentlemen that were reported to me to have been down talking to Lacey. When Barclay came in he said

(Testimony of Lewis J. Hampton)

the stock was approved for listing on the Salt Lake Exchange and would be called within the next two or three days, and he was in a hurry to get back to Salt Lake to be there to handle the call (Tr. 804), and said it would be called at 7 or 9 cents a share; that the stock was ridiculously low and it ought to be selling at 25 cents. At a time between the second and third purchases that I made of stock, and while Collins, McEvoy and Murphy were present, it was stated that Plymouth Well No. 2 was producing 550 but that it was good for a thousand barrels on a test. Altogether I purchased 15,000 shares, at $2\frac{1}{2}$ cents a share, and I naturally relied upon what was told to me in the making of the purchases, and made no independent investigation of Union Associated Mines Company or of the Plymouth Oil Company. Government's Exhibit No. 44 for identification is a letter dated July 12, 1939, which I received at my house in Los Angeles, on or about the postmarked date of July 12, 1939. It is on a letterhead of the Union Associated Mines Company, and dated July 12, 1939, signed "Union Associated Mines Company, by J. H. Morgan, Secretary."

Mr. Cannon: I object to it on behalf of all the defendants separately and jointly on the ground that there is no proper and sufficient foundation laid for it, and it is immaterial and irrelevant in the case.

* * * * *

Mr. Cannon: There is no foundation laid for it. [127]

The Court: Is that one of the indictment letters?

Mr. Evans: Yes.

The Court: You will have to show it was mailed.
(Tr. 807)

(Testimony of Lewis J. Hampton)

Cross-Examination

By Mr. Cannon:

In addition to the 15,000 shares I bought, I think I bought an additional 1,000 shares from Hogle's office, or through a man named Bud Whittaker there. It may have been from him personally. I do not remember the exact date but it may have been in October, 1938. It was a month or so before I bought this stock from McEvoy. I paid for it by check, at $2\frac{1}{2}$ cents. Whittaker told me that he had heard that the stock was going to be listed and was going to be let loose in Los Angeles, and that they were going to drill some wells at Torrance. I believed him. He said they were going to drill some wells, and I believed that. I knew very little about the Torrance Field at that time. All I knew about it was were the ordinary oil reports. I subscribe to all oil journals, and have for about twenty years. I do not recall that Whittaker told me anything else other than what I have said. I think I made my purchase from Whittaker in November, 1938. After that purchase I watched in a general way the progress of the Torrance Field, as reported in the Oil Journal, but I was in Kern County practically all of the time. (Tr. 813) I did not pay any particular attention to the investment that I had made in the stock in November, 1938, but when McEvoy talked to me, naturally my interest in the stock increased. I have owned oil stock over a period of years, and I have been buying and selling and trading-in stock. I bought this stock from Whittaker with the idea of making a profit. I don't know whether I [128] bought it from Hogle & Company, or whether I bought it from Whittaker personally. I surely remember everything very distinctly that McEvoy told me, and also

(Testimony of Lewis J. Hampton)

everything that Collins told me, but I cannot remember now whether Whittaker delivered the stock to me, or whether Hogle & Company did. The statement which I made to the S. E. C. on October 19, 1939, was made when my memory was much clearer than it is now. I have dealt with Hogle & Company for some time, at their place of business on Sixth Street in Los Angeles. (Tr. 817) When I went in to buy this stock from Whittaker, I did not ask him anything about any cheap stock that I could buy. I cannot remember that, although the statement which I gave to the S. E. C., in October, 1939, states that I asked Bud Whittaker, a customers' man, "what cheap stock looked good." (Tr. 818) There was nothing that Whittaker told me that caused me to buy this stock. It was only a small matter. The fact that he told me the stock was to be listed on the Salt Lake Exchange, according to report, together with the drilling down there, had something to do with my buying the stock. Whittaker also probably told me, as I stated in my statement to the S. E. C., that a lot of the boys in Salt Lake City were purchasing Union Associated stock. (Tr. 820) I do not remember whether I sent the 1,000 shares of stock for transfer to my name, but it is probably true, as stated in my letter to the S. E. C.: "It was this stock that Mr. Hampton forwarded to Salt Lake City for transfer into his own name." (Tr. 820) I do not know where that certificate is now. I may have it somewhere. I never sold it. I do not remember ever getting any literature, but it does seem to me I got a financial statement at one time. I cannot state whether I got Government's Exhibit No. 3 in evidence; I do not remember. I do not recall reading it. I could have gotten [129] the letter. The

(Testimony of Lewis J. Hampton)

property I was working on in Kern County is oil property, actually producing. I do not remember receiving the circular letter of January 6, 1939, Government's Exhibit No. 3. I do not recall the letter at all. I think Whittaker sent this 1,000 shares of stock up to Salt Lake City for transfer into my name. Government's Exhibit No. 20 shows my name as a stockholder of 1,000 shares. Barclay told me that the stock had been approved for listing. He did not say it was about to be approved, but that it had been approved and passed by the Board and would be called. He did not say it was practically approved. I notice the statement that was included in my statement to the S. E. C. on page 3, as follows:

"Barclay, Hampton said, told him that he had just come to Los Angeles and had just finished talking with Roy Lacy."

Then I skip a little bit:

"Barclay told Hampton that the listing application to list the subject company's shares on the Salt Lake Exchange had been practically approved for listing."

A. Had been approved.

Mr. Manster: I am going to make an objection at this time to this type of cross examination on the ground it is irrelevant and immaterial, this distinction between "practically" and "about to be approved." If Mr. Cannon wants to offer the statement in evidence we have no objection.

(Testimony of Lewis J. Hampton)

Mr. Cannon: I will offer it in evidence.

The Clerk: Defendants' G.

(The document referred to was Defendants' Exhibit G, and received in evidence.) (Tr. 826-827) [130]

(Witness continuing)

I think Mr. Duvoisin was a representative of the S. E. C. to whom I talked, and to whom I made the report. Mr. Manster and Mr. Evans called me in the last few days and asked me to appear in this case, and asked me to bring my checks in, and they talked to me very briefly about the statement that I had made to Mr. Duvoisin, and went over that statement with me very briefly, and told me I would be asked certain questions, such as to verify the checks and the letter, and that is practically all. I think perhaps they asked me whether or not Collins had ever told me that the well was 350 barrels.

A. I am not sure that they discussed the production, I wouldn't say definitely that they did.

Q. Now, before you told me they had.

A. I think they read that part of it to me out of that statement.

Q. Read what part of it to you?

A. Where they said it was producing 350 barrels.

Q. They read that to you, are you sure of that?

A. No, I am not. (Tr. 829)

* * * * *

(Testimony of Lewis J. Hampton)

Q. By Mr. Cannon: Calling your attention to this Exhibit G in evidence, the third page, the first sentence:

“During the course of the conversations McEvoy told him that the first well had been brought in on production and was producing 200 barrels of oil per day.”

Did McEvoy tell you that?

A. Yes, he said it was good for 350 barrels, that it was producing 350 barrels. [131]

Q. Said it was producing 350 barrels? A. Yes.

Q. Now, then, whose handwriting is this where that pencilling is around the edge, “350 barrels is correct”?

A. I don't know. (Tr. 830)

(Witness continuing)

I do not remember whom it was that I first told that Collins had said that the well was producing 350 barrels. McEvoy and Collins told me that Well No. 2 was in, and said it was good for 1,000, and producing, and I was asked to go down and see it, but I did not. I was too busy. Torrance is about 10 miles from Los Angeles, and when I was in Los Angeles I had very little time, and did not have time to go down to see the well. I do not know whether I had already bought all of my stock at the time when Collins told me that Well No. 2 was in and was producing 1,000 barrels. I do not know whether I bought any more stock after that, or not.

Mr. Cannon at that time read Defendants' Exhibit G.

[DEFENDANTS' EXHIBIT G]

MEMORANDUM

Date October 19, 1939

To: Mr. Charles R. Burr, Assistant Chief Accountant
Investigator

From: Mr. William Duvoisin, Accountant Investigator

Subject: Union Associated Mines Company

Pursuant to our request, Mr. Lewis J. Hampton, address 1054 South Hudson Avenue, telephone Walnut 2442, called at the Los Angeles office in connection with the subject company. Mr. Hampton had with him the following street certificates which he acquired by purchase from John McEvoy on three different occasions:

No. 4065	1,000	I. Hansen	1-30-39
4066	1,000	"	1-30-39
4067	1,000	"	1-30-39
4068	1,000	"	1-30-39
4069	1,000	"	1-30-39
3396	1,000	A. A. Julian	9-27-38
3397	1,000	"	9-27-38
3398	1,000	"	9-27-38
3399	1,000	"	9-27-38
3400	1,000	"	9-27-38
3808	1,000	R. A. Dunnigan	1-3-39
3807	1,000	"	1-3-39
3806	1,000	"	1-3-39
3805	1,000	"	1-3-39
3851	1,000	"	1-3-39

15,000

(Defendant's Exhibit G)

Mr. Hampton also had with him four personal checks all issued to McEvoy and endorsed by McEvoy. The first check was dated January 16, 1939 in the amount of \$112.50, the second check January 19, 1939, \$125, the third check February 1, 1939 in the amount of \$25, and the fourth check dated February 9, 1939 in the amount of \$87.50, for a total of \$350. Mr. Hampton stated that the above checks were in payment of three 5,000 share lots of the subject company's stock which he purchased from McEvoy, the first lot at $2\frac{1}{4}\phi$ per share, the second lot at $2\frac{1}{2}\phi$ per share and the third lot at $2\frac{1}{4}\phi$ per share. It has been noted that the schedule 3 forwarded to us by the Denver Regional Office shows only 1,000 shares being registered in the name of Mr. Hampton. This stock, Mr. Hampton said, was purchased by him through Hogle & Co. of Los Angeles in November, 1938 and was transferred by him into his name, solely for the purpose of having his name show as a stockholder, so that he could make inquiry of the company as to its activities. Mr. Hampton recited the following story which caused his investment.

In connection with the first lot of stock purchased through Hogle, Mr. Hampton said that he had an active brokerage account at Hogle & Co.; that during the month of November, 1938, he happened in Hogle & Co's office and asked Bud Whitaker, a customer's man, what cheap stock looked good. Whitaker, he said, told him that a lot of the boys in Salt Lake City were purchasing Union Associated Mines stock. Hampton said that Whitaker made no other representations and that resulted in his purchasing 1,000 shares. It was this stock that Mr. Hampton forwarded to Salt Lake City for transfer into his own name.

(Defendant's Exhibit G)

In January, 1939, Hampton said that John McEvoy telephoned him and requested that he be given the opportunity to talk with him about a mining stock. Hampton said that McEvoy during the course of the conversation made no mention of the stock in which he was interested, but did state that it was an old Salt Lake mining company that was being revised and was going to enter into the oil business. Mr. Hampton said an appointment was made with Mr. McEvoy, and that the following

[written in pencil: house.]

evening McEvoy called at his ^ office. McEvoy, he said, explained that he was working with a man who had a call on a big block of stock of the Union Associated Mines Company. McEvoy said that Union Associated was going into the oil business and was being financed by a wealthy local man. Although the name was not mentioned at that time, the person was later learned to be Mr. Roy Lacey. The wealthy man, McEvoy said, was willing to supply all the necessary drilling money so long as the company did not wildcat. McEvoy also told Hampton that there was an unlimited amount of capital available for drilling operations; that the company had acquired proven leases in the Torrance oil field. Mr. Hampton said that McEvoy made no mention of the company that he was representing. McEvoy told Hampton that the stock of the Union Associated Mines Company would be listed on the Salt Lake Exchange and be called for trading at 6¢ per share. McEvoy said that he was in a position to sell stock to Hampton at 2½¢ per share. Hampton said that his wife was present during the subject conversation, and that he advised McEvoy that he would think the matter over and get in touch with him within a few days.

(Defendant's Exhibit G)

Hampton said that shortly thereafter on January 16, 1939, he called at McEvoy's office in the Foreman and Clark Building, Los Angeles. The office, he said, was adjoining that of Mr. Fischgrund, an attorney. Mr. Hampton said that upon his call at the office he was introduced by McEvoy to James H. Collins and Joseph Murphy. Collins and McEvoy, he said, again told him of the block of stock that they had for sale at $2\frac{1}{2}\phi$ a share. They made no mention, he said, of their participation in the matter or of any company that they were supposed to be connected with. Collins and McEvoy, he said, told him that the Plymouth Oil Company were drilling wells and had transferred to the Union Associated company the 50% interest in one well for a block of stock. The expense of the drilling of the well, Collins told Mr. Hampton, was being borne by the Plymouth Oil Company; that the Union Associated Mines Company would share no expense of the drilling operation, but would share 50% in the return from the well. Mr. Hampton said that he had no idea as to how his money was to be used that he subsequently furnished for the purchase of stock.

Following the conversation with Mr. Collins and McEvoy, Mr. Hampton issued his first check in the amount of \$112.50 in favor of McEvoy covering the purchase of 5,000 shares of stock. The certificates, Hampton said, were delivered to him in street name at McEvoy's office. Mr. Hampton said that McEvoy continued to phone him daily and told him how the first well was progressing. During the course of the several phone conversations, McEvoy told Hampton that all funds received by the Union company from the sale of oil would be disbursed in dividends; that none of the money received as income would be re-invested. Upon such representations, Mr. Hampton

(Defendant's Exhibit G)

said he purchased a second 5,000 share block of stock on January 19, 1939, for which he paid \$125 or $2\frac{1}{2}\phi$ per share. Following the second purchase, Mr. Hampton said that McEvoy continued to phone him at least a couple of dozen times. During the course of the conversations, McEvoy told him that the first well had been brought on

[written in pencil: 350 is correct]

production and was producing 200 \wedge barrels of oil per day; that a second well had already been commenced and that the Union company would participate in that well. Mr. McEvoy offered Mr. Hampton an additional 5,000 shares of stock at $2\frac{1}{4}\phi$ per share. Mr. Hampton said that after much persuasion he made a second call at the office of McEvoy and was introduced to Mr. Barclay, President of the Salt Lake Stock Exchange. Barclay, Hampton said, told him that he had just come to Los Angeles and had just finished talking with Roy Lacey. Barclay said that Lacey had told him that he had unlimited money to back the company in its drilling operations, so long as the company did not wildcat. Barclay told Hampton that the listing application to list the subject company's shares on the Salt Lake Exchange had been practically approved by the listing committee and would be called for trading within a few days. Barclay, Hampton said, told him that the stock was selling at a ridiculous price, and that it should be selling for 25ϕ per share. Barclay also told him that the stock would be called for trading at 7ϕ or 8ϕ per share. Mr. Hampton said that Mr. Collins, Mr. McEvoy, Mr. Siens and a couple of attorneys were present during the time that Barclay made the latter representations. Collins during the course of the conversation stated that the company had already decided to pay a

(Defendant's Exhibit G)

dividend, but that it was being held up until such time as the stock was listed, as the SEC might think that the company was paying a dividend for the purpose of encouraging the listing of the stock. During the course of the conversation, Mr. Hampton was also told by Collins that the second well was about to come in, and that it would probably produce in the neighborhood of 1,000 barrels of oil per day.

Mr. Hampton said that following his conversation with Collins, McEvoy and Barclay, and principally upon the information furnished him by Barclay, he purchased the third 5,000 share block of stock at $2\frac{1}{4}\phi$ per share. He said the stock was delivered to him approximately two weeks later in the office of Mr. McEvoy.

During the course of the interview with Mr. Hampton, Mr. E. C. Deeble, a close personal friend of Mr. Hampton, called at this office and was present during the latter part of the interview. Attached hereto is letter and envelope received by Mr. Hampton from the subject company.

William Duvoisin

William Duvoisin

Accountant Investigator

WD:IB

Note:—On Jan. 7, 1941, Mr. Hampton called by phone and stated his address in future will be General Delivery, Sonora, Calif. J. M. Evans.

[Endorsed]: Case No. 15229-Cr. U. S. vs. Collins et al. Defts. Exhibit G in Evidence. Date Jul. 14, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Testimony of Lewis J. Hampton)

(Witness continuing)

I did not have any friend actually working on the Plymouth wells.

Cross-Examination

By Mr. Blue:

I ran a gold dredge in Sonora for a few months. I have drilled oil wells myself, probably two or three dozen or more, and I have not drilled any dry wells, although some were weak, but they all produced. I drilled them in Kern County, California, and in Texas. While I was busy in Kern County, Mr. McEvoy was calling on me when I was down [132] in Los Angeles for consultation, but I could not find time to go out to the Torrance Field, although I waited in the Plymouth office for Mr. Barclay for several hours. I do not think Fischgrund was present in the Plymouth office at the time that I talked with McEvoy about the well. I do not recall how many people were in the office the first time I met Fischgrund there, but I remember Collins and McEvoy were there, and someone else, but I do not remember who it was. Prior to the last year, I have gone in to see Mr. Fischgrund a number of times to see if there was any possibility of getting any money out of this because I wanted to get my money back, and I never did talk business with him until I went in and asked him for my money back. I do not think he had anything to do with selling any stock, although I think he was present a number of times, but McEvoy and Collins were the two that sold the stock. I naturally knew that McEvoy and Collins were selling stock but I did not know whether or not they were officers of the Corporation. I do not know when well No. 2 came in, and I do not therefore know whether or not I bought

(Testimony of Lewis J. Hampton)

any stock after that well came in. I have been trading with Hogle & Company longer than ten years and I have bought and sold stocks. When I bought this stock from Whittaker he did not say that it was his own stock, and I did not ask him. I have met Mr. Gordon at the Italo Petroleum Company, and I also saw him at the Plymouth office when I went to see McEvoy, but I did not talk with him. I knew Gordon was president of the Plymouth Oil Company. I do not know Mr. Schirm. I do not know that I ever saw him in the offices of the Plymouth. I probably have. I do not know that the purchase of oil stocks particularly is a gamble, necessarily. The 1,000 shares that I bought were bought for an investment and cost me \$25.00. I did not know what Collins [133] was paying for his stock. At the time I bought my stock Collins said he had a contract with Siens for the purchase of about a million shares, on a sliding scale, but he did not tell me that the prices I was paying was the price he was paying.

Re-Direct Examination

By Mr. Evans:

The 15,000 shares for which I paid \$350.00 were bought by me as an investment.

Re-Cross Examination

By Mr. Cannon:

I decided to give it up as an investment when the news came around that Mr. Lacey was not backing it, but I do not remember when that was. I have no idea as to whether I decided that it was not a good investment in 1939 or 1940.

(Testimony of Lewis J. Hampton)

Re-Cross Examination

By Mr. Blue:

I do not know who it was that told me that Lacey was not going to go any further, and I do not recall where I heard it.

(Witness excused.)

MRS. MARGARET FLORENCE PERRI,
recalled as a witness by and on behalf of the Plaintiff,
having been previously duly sworn, testified further as
follows:

Direct Examination

(continued.)

By Mr. Evans:

I am the same Mrs. Perri who testified a couple of days ago, and I was employed as a stenographer for Mr. Morgan in Salt Lake City from November, 1939, to December, 1939. Exhibit No. 44 for identification, a letter addressed to Hampton, dated July 12, 1939, bearing the signature of J. H. Morgan, was typed by me and placed in an addressed envelope, stamped, and mailed. [134]

(The document was marked Exhibit 44, and received in evidence.)

(Witness continuing)

Exhibit No. 45 for identification is a letter dated March 31, 1939, addressed to Miss Ida M. Apperson, that I signed and typed and mailed.

(Testimony of Mrs. Margaret Florence Perri)

Exhibit No. 46 for identification is a form letter dated August 1, 1939, and is a duplicate of Government's Exhibit No. 6 in evidence, was mailed by me.

Government Exhibit No. 47 for identification, the envelope with cancelled postage bearing the postmark August 12, 1939, addressed to R. W. Peet, was typed by me and stamped and mailed.

Government Exhibit No. 48, a letter on the letterhead of Union Associated Mines Company, dated September 20, 1939, addressed to Mr. Bates, bears my signature. I typed it and signed the letter, and placed the letter in an envelope, addressed it, stamped it and put it in the mail.

Whereupon, Government's Exhibits Nos. 45, 46, 47 and 48 were offered and received in evidence. (Tr. 865)

Cross-Examination

By Mr. Cannon:

Before my marriage my name was Margaret Florence. I was working for Mr. Morgan on January 6, 1939. I mailed out letters in the same form as Government's Exhibit No. 3, being a form letter concerning 2,000 barrels of oil, to all stockholders of record except to those who lived in Salt Lake City and to whom we delivered them; but all of the stockholders of Union Associated got one of those letters, so far as I know. Mr. Lewis J. Hampton, who appears on the stockholders' list (Exhibit No. 20) got one of those letters.

(Witness excused.) [135]

FRANK L. TUCKER,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Frank L. Tucker. I live in Los Angeles. In 1939 I purchased stock of Union Associated Mines Company, after having talked about it to Joseph Murphy. This was in February or the latter part of January, 1939.

Q. And tell me, if you will, the conversation between you and Mr. Murphy with relation to the Union Associated Mines stock.

Mr. Cannon: Objected to, if the Court please, on the ground it is hearsay. It can have no bearing on the issues in the case. May I ask a question on voir dire?

The Court: Yes.

Mr. Cannon: Did you ever talk to any of the defendants before you bought any of this stock?

The Witness: No, sir.

Mr. Cannon: Or with Mr. Adkisson or Mr. Barclay?

The Witness: No, sir.

Mr. Cannon: I object on the ground it is hearsay, no proper or any foundation is laid for it at this stage of the proceedings.

The Court: He may answer.

Mr. Cannon: Exception. May I have an exception running to it all, if the Court please?

The Court: Yes. (Tr. 869)

(Witness continuing)

Murphy said he had quite a block of Union Associated and was going to sell, and wanted to know if I would be interested in taking 10,000 shares at 3 cents; and that

(Testimony of Frank L. Tucker)

he was going [136] to get it approved by the S. E. C. and that the prices would graduate up, he thought, as it went along. At that time I bought 10,000 shares from him for \$300.00. He said they were drilling a well out in Florence. I believe he said they had one well and was drilling on the second one. At a later date, Mr. Murphy exhibited to me a contract, but he did not show it to me at the first meeting. At the first meeting I did not place any order with him for stock, but I did at the second or third meeting. Murphy was alone when he called to see me; he probably called a dozen times altogether. Exhibit No. 49 for identification is a \$300.00 check dated 2-14-39, payable to the order of J. H. Collins, and signed by Frank L. Tucker, and bears the endorsement of Collins, paid and charged against the account of mine. This check was given for the 10,000 shares of Union Associated delivered to me by Murphy. The check was made payable to the order of Collins because, Murphy told me, Collins had the contract for the sale of the Union Associated stock and he was working with him and for him, and Murphy asked me to make out the check to Collins. I thereafter received my certificate for 10,000 shares. At the time of this purchase on February 14, 1939, I believe Murphy said that the well was making about 255 barrels per day, and later he told me something about the second Plymouth well. He told me that Gordon, Siens, Lacey, and somebody else were the officials of the Plymouth Oil Company; and said Lacey was furnishing the money for the drilling operations. He told me that Collins' contract was for stocks from about 3 cents to about 26 cents per share; and that under that contract they, he and Collins, had to take about 83,000 shares per

(Testimony of Frank L. Tucker)

month, until the contract was filled. (Tr. 874) I had not met Collins up to this time. I first met him some time after I had bought all of my stock. It was either in May [137] or June. Government's Exhibit No. 50, a check dated February 20, 1939, drawn by me to R. L. Colburn Company in the amount of \$147.50 was delivered to Murphy.

Q. And will you state the occasion for your delivering such a check to him—

Mr. Cannon: Objected to on the ground it is hearsay.

The Court: He may answer.

Mr. Cannon: Exception. Go ahead. (Tr. 876)

(Witness continuing)

Murphy said there was stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid $2\frac{1}{2}$ or $2\frac{3}{4}$, and asked if I had any objection to what brokerage he put the order in through, and I told him I did not. So, when the order was confirmed, I gave him a check to deliver to the brokerage firm that he had picked out. I did not pick out R. L. Colburn Company. Murphy delivered the confirmation to me and I thereupon issued my check, Exhibit 50. I bought 5,000 shares through Colburn Company. Government's Exhibit No. 51 appears to be a duplicate deposit slip on the Bank of America bearing the date of February 28, 1939, and states, "Certified Check, \$1650." I got this certified check to pay for stock of the Union Associated. Murphy came to see me and said they lacked 55,000 shares of having the stock picked up for that month, and I gave him a check, payable to Siens, for this 55,000 shares. I visited the Plymouth wells in Torrance in the latter part of February

(Testimony of Frank L. Tucker)

and again in March, 1939. I have met Guy Davis, secretary-treasurer of Plymouth Oil Company, at the field, and he told me that he was in charge down there, and I asked him what the wells were doing. He did not seem to want to talk about it, and finally I told him I had bought 65,000 or 70,000 [138] shares. Then he said the first well was making around 145 to 150 barrels, and the second well was making about 255 barrels. This was around the first of March, 1939. I did not talk to him about dividends of Union Associated, but I told him I had bought the stock at 3 cents a share, and he said the way those wells were going it should pay some dividends immediately, and it might be as much as 3 cents a share, or something to that effect. Altogether I think I purchased 70,000 or 74,000 shares. Government's Exhibit No. 52 is a confirmation upon the stationery of R. L. Colburn & Company for 5,000 shares of Union Associated at \$147.50, under date of February 20, 1939. I received it by mail. In buying this stock I placed reliance upon statements made to me by Murphy and also on what I saw of the wells. I did not place reliance upon statements made by any of the defendants in this case, because I had never talked to any of them, and I did not know any of them. I did not rely upon anything that Davis told me because I had already bought my stock prior to the time I met him.

Mr. Evans: Your Honor, at this time I wish to offer in evidence Government's Exhibits 49, 50, 51 and 52.

Mr. Cannon: I will object on the ground that they have no bearing on the issues in this case at all, particularly in view of the last few statements made by this witness that he never talked to any of the defendants

(Testimony of Frank L. Tucker)

and never relied on any representations made by any of the defendants in the purchase of the stock.

The Court: All except Murphy.

Mr. Cannon: He is not a defendant. I said the defendants.

The Court: Objection overruled.

Mr. Cannon: Exception. [139]

(The documents referred to were marked Plaintiff's Exhibits Nos. 49, 50, 51 and 52, and were received in evidence.)

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased? A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. (Tr. 883)

* * * * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes.

(Testimony of Frank L. Tucker)

Mr. Evans: Will you mark this, please?

(The document referred to was marked for identification as Plaintiff's Exhibit No. 53.)

Q. By Mr. Evans: Calling your attention to Government's Exhibit No. 53 for identification, which appears to be the note you have mentioned, is it correct, Mr. Tucker, that you surrendered your stockholdings in Union Associated Mines Company in return to this note?

A. That is right. [140]

Q. Did you receive any cash in addition to this note?

A. No, sir.

Q. Has this note been paid, or any part of it been paid to you as yet?

A. No, sir.

Mr. Cannon: May it be understood that my objection goes to all of this line and also an exception to it?

The Court: Yes. (Tr. 884-885)

Mr. Cannon: I move to strike all the testimony of this witness on the ground that it has no probative value in that it is wholly incompetent, irrelevant, immaterial and hearsay as against all of these defendants, no reliance having been placed by this witness upon any representations made by any of the defendants, and it further appearing that no representations of any kind were ever made by any one of these defendants to this witness.

I think that covers the suggestion made by Mr. Blue that I add to it, if I haven't already done so, that it is hearsay, because it doesn't appear that Mr. Murphy was ever authorized to speak for any of the defendants, nor does it appear that any of the defendants knew of any of the representations made.

(Testimony of Frank L. Tucker)

The Court: The motion will be denied insofar as the testimony goes to the surrender of the stock. On the securing of the note, that part may be stricken. (Tr. 886) [140a]

Cross-Examination

By Mr. Cannon:

I relied in buying this stock upon the statements that Murphy made that they had a well down there making about 250 barrels a day. He told me this before I bought any stock, and he also brought me down and showed me the well and told me that he thought the stock was going up. He said they had a contract to sell a block of Union Associated, and wanted to know if I would be interested in buying 10,000 shares; and they hoped to get it approved by the S. E. C.; and that he had a contract to purchase the stock on a graduated scale. Murphy also said that Gordon, Siens and Lacey were behind the wells down there, but I do not think he told me they were officers in the Plymouth. I do not think I relied on those statements. Murphy told me that Lacey was putting up the money to drill the wells, and I believed that, and I found it to be true. I saw the contract for the purchase of the stock, from 3 cents up to 25 or 26 cents. I do not know whether or not I read the contract, but I read part of it, and saw the graduated scale part of it. I had bought 10,000 shares before I saw the contract, and I bought the other 64,000 or so after I had seen the contract; and I bought that 64,000 or 65,000 shares at a price no greater, and in some instances less than the call price under the contract that Murphy had. I paid no [141] premium for the stock. I believe I bought all of my stock in February, 1939. Murphy told

(Testimony of Frank L. Tucker)

me that they had bought a certain amount of stock but had not been able to pick up the rest of it and asked me to furnish the money to buy the additional 55,000 shares required under the contract.

Q. By Mr. Cannon: Under the contract Murphy said that they required 83,000 to be purchased each month?

A. That is right. (Tr. 890) [141a]

* * * so I bought that stock at the contract price in the Murphy contract, and paid the money over to Mr. Siens, with whom Murphy had his agreement. I bought this stock as a speculation, pure and simple, and I put in, I think, \$2,445.00 altogether. (Tr. 891) I do not know how much Murphy himself put into it; nor how much Collins put in.

DR. DELMAR E. WILLIAMS,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Delmar E. Williams, and I am a physician and surgeon, and live in Los Angeles. I am acquainted with Ray W. Peet who died approximately a year ago. I own 5,000 shares of stock in Union Associated, which I purchased in January, 1939.

(By stipulation Plaintiff's Exhibit No. 54, a check drawn by the witness for \$125.00 payable to the order of John McEvoy, dated January 26, 1939, endorsed by McEvoy, and Exhibit No. 55 covering 9 certificates of stock, dated August 11, 1939, in the name of the witness, were offered and received in evidence.)

(Testimony of Delmar E. Williams)

(Witness continuing)

I delivered this check to McEvoy and prior to that I had a conversation with him.

Mr. Cannon: To save some time, I object to all this testimony of this witness as to any conversations with Mr. McEvoy [142] out of the presence of the defendants on the ground that it is hearsay as to them, irrelevant and immaterial and incompetent for that reason; may it be understood that my objection runs to the entire line of testimony along that line, and may I have an exception to the rulings?

The Court: Yes. (Tr. 893-894)

(Witness continuing)

Two or three days before January 24, I had a conversation in the Plymouth office. Mr. Peet and Mr. Hampton were there, and I talked principally with McEvoy. Collins was there and Murphy was there, at some time during our conversation. McEvoy told me that they were selling some of this stock largely to get a wide circulation so that it might be put on the Salt Lake Stock Exchange. He said they were associated with the Plymouth Oil Company, that had two wells, one well down here and that it was at that time pumping about 500 barrels of oil, and were drilling a second well, that they thought was about ready to come in; that Lacey had \$75,000.00 invested in the Plymouth Oil Company and had received a large block of stock, and in order for Lacey to receive anything out of it by way of profit, the stock would have to sell for more than 25 cents a share, and that it would be very soon listed on the Salt Lake Exchange at 7 cents a share. Several days after that McEvoy called me on the phone and told me that they had brought the second well in, and that it was producing 500 barrels a day, and

(Testimony of Delmar E. Williams)

if it were put on full capacity it would easily go to 1,000 barrels a day, and that some of his acquaintances or friends had some stock in the Union Associated Mines that they would like to convert into money, because they needed money badly, and he could get that stock for 3 cents a share if I wished to purchase it; but I did not make any [143] further purchases. Mr. Ray Peet also purchased some stock of this company.

(At this point, Plaintiff's Exhibits No. 56 and No. 57 were offered and received in evidence; Exhibit No. 56 being 2 checks issued by Peet; and Exhibit No. 57 being 5 stock certificates of Union Associated Mines Company each for 1,000 shares in the name of R. W. Peet.)

Cross-Examination

By Mr. Cannon:

I think I made a statement to the S. E. C., but I could not give you the date of it. It has been almost five years. I made some statement. I do not know the date. I have not seen the statement recently, but I have been interrogated on the statement within the last few days. Evans talked with me about it in the last few days. I asked him questions about the statement that I had made in my former statement, and told him I was a little hazy and did not know whether I would be able to recall or remember the transactions very accurately. He did not particularly refresh my recollection as to what was said to me at the time I bought the stock, but he may have. I cannot tell you what Mr. Evans said. He did not read

all of my statement to me, but he read some questions. I just cannot tell you what things Mr. Evans refreshed my recollection on.

(At this time, Mr. Evans read Plaintiff's Exhibits 30, 33 and 44.) [144]

[PLAINTIFF'S EXHIBIT NO. 30]

Wm. Weeks,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah

August 1, 1939

To the Stockholders of Union Associated Mines Co.:

The following is a report of your Company since the No. 1 well at Torrence Field, Los Angeles County was drilled.

The No. 1 well has produced \$8,241.44 as shown by the books of the Standard Oil Company, (Oil Purchaser). Union Associated interests amount to \$4,115.22. From this amount, your Directors have declared a dividend payable August 30, 1939, of \$1.00 per thousand shares on the issued and outstanding stock of record, (except the 635,000 shares delivered to the Plymouth Oil Company on Well No. 2. which 635,000 shares was delivered ex-dividend as per contract between the two Companies).

(Plaintiff's Exhibit No. 30)

Transfer books of the Company will be opened for transferring stock until August 23, 1939.

The No. 2 well has produced \$5,290.00 to date. This amount has been applied to costs of drilling as per original contract whereby Union Associated acquired its interests in No. 2 well.

The 40 acres in Kearn County remain unchanged, no well having been completed to prove or disprove the District. The lease at Lomita has been abandoned because the drilling in that area has proven unfavorable. From present appearances, the Union Associated will not acquire any interest in the West Montebello Field because the test well (Goff Course Well) is reported unfavorable at 8200 feet. This has been quite disappointing, as your Directors had intended making a very favorable deal with the Plymouth Oil officials on acreage in that District had the test well been successful.

There has been a contract let to drill the Beacon Dome, located on the Meridian Anticline Uinta County, Wyoming. Through the efforts of the Plymouth Oil Company and the writer, your Company has acquired a 40-acre lease favorably located on that structure immediately adjacent to the land acquired by the drilling company. We are, also, negotiating for an 80-acre lease on Sulphur Creek Dome, which, from present appearances will be drilled this fall. These leases will cost the Company no stock and not to exceed \$100.00 each.

(Plaintiff's Exhibit No. 30)

The Company has protected its mining claims in the Cottonwood and Erickson Mining Districts. These are the most important claims the Company owned during its metal-mining activity.

As heretofore stated, the present policy of the Union Associated is to acquire interests in oil wells or leases prior to drilling, with the expectation of big returns should the wells prove commercial. Of course, each attempt will not be successful, but adhering to the law of averages, we feel that this Company can be made a success.

In the future, the Company will attempt to get out a report as often as possible, but it is quite impractical to answer each individual letter, so please bear with us until a report to all the stockholders can be sent.

The cost of transferring stock is 25 cents for each certificate and 12 cents Federal transfer tax per 1000 shares.

Very truly yours,

UNION ASSOCIATED MINES COMPANY,

By J. H. MORGAN, Secretary.

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 30 Identification. Date Jul. 12, 1944. No. 30 in Evidence. Date Jul. 12, 1944. Clerk, U. S. District Court, Sou. Dist of Calif. E. M. Frankenberger, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 33]

R. R. Bray,
President

J. H. Morgan,
Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130

Suite 526 Utah Oil Bldg.

Salt Lake City, Utah

March 22, 1939

Miss Grace T. Walker
1400 Hillcrest Avenue
Pasadena, California

Dear Madam:

Enclosed find certificates in the name of Grace T. Walker, 26,667 shares; Bessie G. McLean, 5,333 shares; Katherine C. Davis, 4,000; and Matilda M. Klinger, 4,000 shares of Union Associated Mines Company stock, as transferred.

Very truly yours,

Margaret Florence
Transfer Agent

enclosure

[Endorsed]: Case No. 15229. U. S. vs. Collins et al. Pltfs. Exhibit No. 33 Identification. Date Jul. 12, 1944. No. 33 in Evidence. Date Jul. 12/44. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger. Deputy Clerk.

[PLAINTIFFS' EXHIBIT NO. 44.]

[Envelope]

526 Utah Oil Bldg.
Salt Lake City, Utah

[Stamped]: Salt Lake City Utah Jul 12 11:30 AM
1939

Lewis J. Hampton,
1054 So. Hudson Ave.,
Los Angeles, California.

R. R. Bray, President

J. H. Morgan, Secretary-Treasurer

UNION ASSOCIATED MINES COMPANY

Telephone Wasatch 2130
Suite 526 Utah Oil Bldg.
Salt Lake City, Utah

July 12, 1939

Mr. Lewis J. Hampton
1054 South Hudson Avenue
Los Angeles, California

Dear Sir:

Answering your recent inquiry, this is to advise you that since the new management took over the Union Associated Mines Company in the Fall of 1938, they have, in conjunction with the Plymouth Oil Company of Los Angeles, drilled two wells in the Torrence Oil Field, Los Angeles County.

(Plaintiff's Exhibit No. 44)

The first well has netted the Company \$3923.00 to date. The second well cost approximately \$37,000 and has not yet been paid for. Your Company will receive no payments until the well is paid for.

Our expenses to date have been \$1603.00, which included re-establishing the old corporation, protecting the mining claims controlled by the Union Associated, office expenses, application for registration with the S. E. C., and application for listing with the Salt Lake Stock Exchange.

The Company has been somewhat disappointed in the returns from the two wells and has not been able to pay a dividend as soon as they expected. However, the Company does expect to pay a dividend as soon as the money has been earned from its two wells.

Very truly yours,

UNION ASSOCIATED MINES COMPANY

J. H. MORGAN

J. H. MORGAN,

Secretary

JHM-mf

[Endorsed]: Case No. 15229 Cr. U. S. vs. Collins et al. Pltfs. Exhibit No. 44 in evidence. Date Jul. 14, 1944. E. U. Frankenberger, Deputy Clerk.

[Endorsed]: Filed May 11, 1945. Paul P. O'Brien, Clerk.

ERLENE BATES,

a witness called by and on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Mrs. Erlene Bates. I live in Los Angeles, and I bought 17,000 shares of Union Associated stock. I am acquainted with Collins. I was first approached in connection with the sale of this stock by Logan Metcalf, near the end of 1938, and I had a conversation with him about the company; and I met Mr. and Mrs. Collins about the same time. The Plymouth Company was discussed when we were all together. They told me that there was one well active at the time, I think producing 350 barrels a day, and another well being drilled at the time, and that the stock would be listed on the Salt Lake Exchange, probably starting at 50 cents and going to a dollar a share (Tr. 916); that Roy Lacey was a heavy investor in the company. [145]

Q. By Mr. Evans: Was Mr. Lacy identified as being an officer of the Plymouth Oil Company? A. Yes.

Q. What was said in that connection?

A. I believe he was president. That I am not clear on. (Tr. 916) In fact, it was my understanding that he was financing it. I think we discussed the company about three times before I made my purchase; and upon those three occasions Metcalf and Collins were both present. It was after those conversations that I made my purchase. I relied upon the statements made by Collins and Metcalf at that time. Government's Exhibit No. 58 for identification consists of two checks, one dated January 10, 1939, in the amount of \$500.00 payable to the order of Logan

(Testimony of Erlene Bates)

Metcalf, the second check being dated February 20, 1939, in the amount of \$21.00, payable to Logan Metcalf. I signed those checks and delivered them to Metcalf, on or about the dates they bear. The \$500.00 was for the 17,000 shares; and the \$21.00, I believe, was transfer charges. Government's Exhibit No. 48 in evidence is a letter upon the stationery of Union Associated Mines, dated September 20, 1939, [145a] addressed to Mr. Erlene B. Bates. I received that letter through the mail. There is no Mr. Erlene Bates. It was probably an error in mailing. I received Exhibit 48 about the date it bears. Government's Exhibit 59 for identification, a letter on the stationery of Plymouth Oil Company, bearing date February 6, 1939, addressed to me, was received by me on or about the date it bears, through the mail.

Mr. Evans: * * * At this time, your Honor, I wish to offer in evidence Government's Exhibit 58, the checks which have been identified by this witness.

Mr. Cannon: I will object on the ground that it is hearsay and no proper foundation has been laid for it.

The Court: They may be received.

Mr. Cannon: Is that No. 58?

The Clerk: No. 58.

(The documents heretofore marked Plaintiff's Exhibit No. 58, were received in evidence.) (Tr. 919-920)

(At this time, Plaintiff's Exhibit No. 59 for identification was received in evidence.)

(Testimony of Erlene Bates)

Cross-Examination

By Mr. Cannon:

Metcalf introduced me to Collins and Mrs. Collins, and after that introduction we went to a number of places, but I cannot give you the names of any of the places where we went, but I do remember going to a number of places. On another evening we went to the home of Mr. and Mrs. Edwards in San Fernando. On the occasion when I met Mr. and Mrs. Collins through Metcalf, there were no other guests at my house that night. I believe we went out to dinner but I do not remember where. I had not previously bought any stock in Union Asso- [146] ciated, before I met Collins, but I had heard of the Plymouth Oil Company before that through Metcalf who first approached me at the end of December, 1938, and told me he had a good proposition where I could make some money, that they were drilling this well and that they had a well with 350 barrels. That was in the latter part of December. He also told me there was another one being drilled at that time, and that there was no question about the stock being placed on the board at Salt Lake City and that it would go from 50 cents to a dollar or maybe a dollar and a quarter. The usual sales talk was given, I had heard enough of such talks to know that this was the usual oil sales talk. I told Metcalf I would consider it. Collins was not there when I first heard this, nor when I first talked to Metcalf about it. (Tr. 923) No one else was present when I had this conversation with Metcalf. I had met Metcalf four or five years previously but I had not known him intimately or very well. I would only see him occasionally by accident. I do not know his business, but I believe he was in the insurance business. I

(Testimony of Erlene Bates)

had never gone out socially with him. After this first conversation with Metcalf I discussed this matter with him almost every day because he would call me up and try to sell me on the idea, and always told me it was prospering. I cannot give you any date on which he talked with me between January 1st and the 10th of January when I made my purchase. I did not meet Collins on the day I gave my check, January 10th, but I had met him before, but cannot give you the date. I met him at my house and I am sure that Mrs. Collins was there, too. The conversation that I had with Collins or Metcalf when I first met Collins was a general conversation. Mr. Metcalf brought up the subject, and Mr. and Mrs. Collins told me that they had invested in this company quite heavily and [147] they naturally thought it was a good proposition.

Q. Anything else? A. That is about all.

Q. Then when did you next see Collins?

A. I don't remember the date.

Q. Did you see him again before you bought the stock?

A. I think I must have seen him altogether about three times before I purchased the stock.

Q. Are you guessing at that or do you have any distinct recollection of it?

A. I don't remember the dates, but I am positive that I saw him at least three times before I made the purchase.

Q. All right. Now, without respect to the date, tell me what you talked about the next time you met Collins.

A. Oh, the same thing.

Q. The same thing you have related just a minute ago about the conversation you had with Collins?

A. Yes.

(Testimony of Erlene Bates)

Q. Was his wife there the second time?

A. I think he and Mr. Metcalf were alone.

Q. All right. Now, the third conversation you say you had when Collins was present, what did Collins say or what did Metcalf say? A. Along the same line.

Q. Nothing more than you have related about the Collins conversation?

A. No. Nothing was added except that it looked better all the time.

Q. That the second well was drilling more deeply, is that right? A. Yes, likely to come in any way.

Q. Those three times that you met Collins occurred between the December conversation that you had with Metcalf and the time you delivered your check on January 10th, is that right? A. That is right.

Q. Collins was not there when you gave the check to Metcalf, was he? A. No, he was not.

Q. And later on you say you gave a check for \$21.00?

A. That is right.

Q. And what was that for?

A. I understood it was for the fee to transfer the stock.

Q. Who told you that? A. Mr. Metcalf. (Tr. 927-928)

Re-Direct Examination

By Mr. Evans:

I appeared here in response to a subpoena.

Q. By Mr. Evans: You have testified, Mrs. Bates, in answer to Mr. Canon's questions that these various statements were made in your presence upon the occasion of Mr. Metcalf's and Mr. Collins' calls upon you. I

(Testimony of Erlene Bates)

will ask you whether or not the representations in connection with the Plymouth well and what was to be done as to Union stock, as you have testified, were made by Mr. Collins as well as Mr. Metcalf?

Mr. Cannon: Just a minute. I object to it, if the Court please, as either an attempt to impeach his own witness or else it is repetitious.

The Court: She may answer the question.

The Witness: Will you repeat the question?

Mr. Evans: Will you read the question, please?

(The question was read.) [149]

A. Yes. (Tr. 929-930)

Recross-Examination

By Mr. Cannon:

I talked to the prosecuting officials this morning concerning the testimony I was to give in this case but I did not look at any statement that I had made to them some time ago, and I do not know whether they had before them, while they were questioning me, such written statement as I had made before.

(Witness excused.)

MRS. RUTH E. GOODE,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Ruth E. Goode and I live in Los Angeles and was formerly known as Ruth Evans. In September, 1939, I was working for R. L. Colburn & Company, a

(Testimony of Mrs. Ruth E. Goode)

brokerage firm in Los Angeles, and acted as stenographer, made out the confirmations and mailed them, and went to the bank, and did general office work. Government's Exhibit No. 52 in evidence bears my signature. I typed it and mailed it.

(Witness excused.)

MARGARET Y. KERN,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Margaret Y. Kern, and I am employed by Los Cal Petroleum and Oil Royalties Corporation, and my immediate superior is Fred Gordon. In early 1939, I was employed by Mr. Dunnigan; and in February, 1939, by Plymouth [150] Oil Company. I had worked for Dunnigan four years prior to January, 1939, and during that period was associated with him in his office. I know Sidney Fischgrund who had an office at suite 905 in the Foreman Building, in December, 1938. Mr. Dunnigan also had an office there in the same suite. I knew a man by the name of William S. Millener. He may have come into the office at 905 Foreman Building in December, 1938, but I do not remember. I may have seen him around there. I know Mr. Millener. I have never seen him around the offices of the Plymouth Oil Company. I do not remember how often during December, 1938, and January, 1939, that Millener came to Mr. Fischgrund's office.

(Testimony of Margaret Y. Kern)

Cross-Examination

By Mr. Blue:

I have worked for Mr. Gordon since we moved over to the Subway Terminal Building, in the spring of 1939. In the suite 905 Foreman Building, there were four other lawyers who occupied separate offices in that particular suite, each of them paying their own overhead. There was no connection or arrangement or anything between Dunnigan, Fischgrund and these other lawyers. I was acting as Mr. Dunnigan's secretary.

(Witness excused.)

(At this point Mr. Manster read a letter from J. H. Morgan to E. Byron Siens, dated October 14, 1938, appearing in Government's Exhibit 15 in evidence; and a letter from E. Byron Siens to J. H. Morgan, dated October 18, 1938, appearing in Government's Exhibit 14 in evidence; and a letter from Siens to Gordon, dated October 31, 1938, appearing in Government's Exhibit 14 in evidence; and a letter from Morgan to Siens, dated November 14, 1938, appearing in Government's Exhibit 15 in evidence; and a letter dated November 16, 1938, from Siens to Morgan, appearing in Government's Exhibit 14 in [151] evidence; and a hand-written letter dated November 13, 1938, from Siens to Morgan, and a letter from Morgan to Siens, dated November 18, 1938, in Government's Exhibit 15 in evidence, and from the same Exhibit a letter from Morgan to Siens, dated November 25, 1938; and a letter dated November 28, 1938, from Siens to Morgan; and Mr. Cannon read a letter dated December 7, 1938, from Siens to Morgan.)

October 14, 1938

Mr. E. Byron Siens
911 Forman Building
Los Angeles, California

Dear Mr. Siens:

Enclosed find certified copy of letter from J. W. Orton to the Union Associated Mines Company certifying that the total outstanding stock of said company is 1,424,229. This total includes the 635,000 issued to the order of Plymouth Oil Company.

Mr. Orton has spent a great deal of time in bringing the stock books up in shape. As I have reported before the matter was much more complicated than it first appeared. He has billed us for an additional \$100.00 on the basis of \$5.00 per day. I have talked the matter over with him and he is willing to wait until the Union Associated has some money in the Treasury. He is now preparing the financial statement which will be submitted to you immediately upon completion.

The most important thing now, as far as I can determine, is the capital stock tax statement of the Union Associated for the Treasury Department. You had better discuss this statement with your accountants. No doubt you understand, that this statement is for the next three year period, and the amount set determines the tax during the next three years. If your statement of capital stock is low and your net profits high your tax is high. If your statement of capital stock is high and your net profits low you can lose money for the company, that way; so it is a question of determining the approximate net profits and making a statement of the capital stock that

will cost the company as little as possible during the next three years.

Certificate 3452 for 10,000 shares in the name of Chris Schirm was sold by Barclay today at 3¢. This, I think, makes the second 10,000 share certificate sold by him at that price. I don't know just what your present plans are, but I am sure the stock could be sold here at 5¢ as easily as it could be at 3¢, if Mr. Barclay would show a little strength at 5¢. The brokers all know that Barclay is representing the California brokers and if he is selling at 3¢ the market goes down immediately. If he is bidding 5¢ the market could easily go to 5¢. It appears that the only source of supply is the Los Angeles Broker's stock through Barclay. I think you have the local market practically cleaned up and with a little strength shown, I believe the market could easily go to 5¢ or higher. Please don't think I am trying to tell you how to handle the market, but I thought you were entitled to the facts as they have come to me.

When you have a minute to spare, I wish you would drop me a line on present developments. I receive numerous calls inquiring as to the present development of the company.

With regards to all, I remain

Very truly yours,

JHM:BP

Encl.

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibits Nos. 178, 178-a. In the Matter of Union Ass'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

PLYMOUTH OIL COMPANY

TUcker 8494
911 Foreman Building
Los Angeles, California

October 18, 1938

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

Dear J. H.:

If nothing unforeseen happens I will put Mr. Gordon and Mr. Adkisson on the plane tomorrow night for Salt Lake City.

They will bring a nice geological report showing all properties the Union Associated are interested in and lots of good news.

One report will be for you and the other for the broker. Just had a call and must run out to the field. Will notify you by wire when the boys leave.

Sincerely

E. Byron Siens

[Endorsed]: Securities and Exchange Commission.
Docket No. D-515. Commission's Exhibit No. 75. In
the Matter of Union Associated Mines. Date 11/15/40.
Witness Electreporter, Inc., Official Reporters.
By Oyler.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

October 31, 1938

Mr. F. V. Gordon

Hotel Utah

Salt Lake City, Utah

My Dear Fred:

I wired you this a. m. to not leave there without calling me, if you were going back to Texas. My reason for this was that Chris said you expected to leave there for Texas without coming through L. A.

Now Fred, here is the situation. Our location is proving better and more certain every day. The three wells, North, South, and East of us are improving every day. The nearest one right East of us called the Louisiana has never stopped flowing.

Now, I have bills from several supply houses for all of the Tubulor equipment including a Lacy pumping unit for our well and it will run around \$14,000.00. I can get from 3 to 6 months on this and I figure if you can get Lacy to guarantee this we will assign our interest in the well or any part thereof until we have paid it all off.

I want to do this for several reasons, first, to make good with Lacy; second, we wont have to sell our stock or at least the bulk of it until/ the well is in and it will bring 3 or 4 times as much money.

What do you think the market on this stock would be if our well was flowing? Well it will be nearer 30 cents than it will be to three cents.

I don't think any one but you personally can show this picture to Lacy so he will realize he is taking no chance even if we can't sell any stock because we can get time enough for the oil to pay this bid off.

We finally switched locations down here in Torrance until we blundered into a sure shot. We will be drilling some time this week. Bryan says he can hit the sand in twelve days if I want him to, but I want to go a little slower and surer so I told him 18 days would suit me all right.

Now Fred, I want you to come and help us over this last jump. We will get the ticket for you so come this way.

Roedecker is back and he got your wire o. k. and he says he will get the lease, but there are so many people to sign it, that it will take most all of this week to get it signed. I wish you could get through down there in Texas and get your shoulder up against this Plymouth wheel and help me because with this 60,000 acre deal and three structures on it, we have a man's job. What do you say?

Very Sincerely,

E. Byron Siens

E. Byron Siens

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibit No. 46. In the Matter of Union Assd. Date 11-7-40. Witness Gordon. Electreporter, Inc., Official Reporters. By Middleton.

Nov. 14, 1938

Mr. E. Byron Seins
911 Foreman Building
Los Angeles, California

Dear Mr. Seins:

Your last two telegrams have been a revelation. The natives here can hardly appreciate that the well is being drilled so fast. I have tried to keep in contact with everybody who might be interested, and have given the Salt Lake Tribune the report. They will run an article in tomorrow's Tribune, and another article will be run by the mining paper here Thursday.

It will take a little time to recover from our first setback on the market, but I am sure that all those who have stock and are receiving the reports will become more interested and start buying. However, I do think that a few orders from Los Angeles would strengthen the market more than anything.

It looks quite possible that I may be in Los Angeles within the next day or two, so I will delay answering your letter until my arrival. In the event that it is impossible for me to get away, I will answer your letter within the next two days.

Please give my best regards to Mr. Adkisson. Expecting to see you in the near future, I remain.

Sincerely yours,

JHM-mf

Securities and Exchange Commission. Docket No. D 515. Commission's Exhibit No. 181. In the Matter of Union Ass'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

November 16, 1938

Mr. J. H. Morgan

526 Utah Oil Bldg.

Salt Lake City, Utah

My Dear J. H.:

Was expecting you down and will be most pleased to see you whenever you can come.

Does the drilling of the well cause any movement of stock up there? I had hoped they would wake up and give us a little play when we actually started, but I guess it did not make much difference. Do you keep in touch with Barclay? You did not say what you thought of my idea of a letter to the stock holders. I think it is very important that we keep in touch with them, but as stated in my last letter I believe it would be better for you to do the letter writing as the Secretary.

When we are ready to pay this first dividend we will get lots of new stock holders. I mean all of this stock that was made out to Schirm will be transfered to the new owners; that is if we sell it.

We haven't sold enough stock to grease the Walking Bean yet. Well, one thing is certain, if we can't sell it we will own it and when the well comes in we will draw the dividends ourselves.

If our well is half as good as our neighbors; we will have \$6,000 per month to pay out in dividends. I wonder what our stock would bring after about 3 dividends and our second well in the sand. If we can drill about 4 wells in this locality we will have a humdinger company. Well, personally I don't see why we can't do that and I have been watching these fields close and I don't know of any place I would rather have our Company drilling, (everything considered) than right where we are. Of course there are larger and deeper districts, but look what they cost.

Well, we are waiting for you to come and see us.

Very Respectfully,

E. Byron Siens.

E. Byron Siens.

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 88. In the Matter of Union Assd. Mines Co. Date 11-22-40. Witness Davis. Electreporter, Inc., Official Reporters. By Morris.

Nov. 18, 1938

Mr. E. Byron Seins
911 Foreman Building
Los Angeles, California

Dear Mr. Seins:

Enclosed find copy of the letter which was sent to the stockholders. After the letter had gone out, I was re-checking with myself, and I feel that we have made a serious mistake in not using the word "should" instead of "will" in the next to the last paragraph, which reads, "which will mean the beginning of dividends for all of our loyal stockholders."

The Government regulations regarding promises of dividends is pretty serious, and this may interfere with our listing of stock.

I wish you would have your attorneys check in these letters to be sent through the mail. Even with all of us checking, we can't be too careful when the matter is to go through the mail.

We are all certainly glad to learn of the depth of the well, and the wonderful progress you are making. Please don't let my worry over the stockholders' letter detract from our appreciation of the wonderful work that you are doing. Of course, I know that you feel that dividends Will be paid, but as a matter of precaution, and keeping us in a position to place the stock on exchange, we just can't be too careful.

With best wishes to all, and still expecting to be in Los Angeles in the near future, I remain,

Sincerely yours,

JHM-mf

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 183. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

Nov. 25, 1938

Mr. E. B. Seins
911 Foreman Building
Los Angeles, California

Dear Mr. Seins:

Because I have been expecting to be in Los Angeles and see you almost every day during the past week, I have delayed writing you about the financial statement and particularly about the mining claims held by the Union Associated.

Under separate cover, I am enclosing a financial statement as prepared by Mr. Orton. This is merely in work sheet form for your auditors and attorneys to examine, and will be completed upon the return with whatever suggestions you may have.

The matter which came up in relation to the claims, and which is extremely serious, is as follows. The Union Associated issued practically two-thirds of its capital stock in acquiring the mining claims which it controlled. In making a statement to the Stock Exchange and to the Securities Exchange Commission, it becomes absolutely necessary to retain or have the claims on which this stock was issued. The old Board of Directors had failed to retain any mining claims in the company since the patented claims which they had acquired, not by the exchange of

stock, but by advancing money to the Confident Mining Company for the purpose of development.

When Orton presented the matter to me, I immediately got busy and commenced relocating the claims held by the company, and which had been exchanged for stock. I did this in order to protect the company and ourselves in regard to the outstanding stock. It was necessary to go to the property and erect monuments on the locations, and record the same to the County Recorder in the County in which the claims were located. To date, this has cost in excess of \$60.00.

I am enclosing a statement of the receipts and expenditures of the money you have advanced to the Union Associated which will show that we owe approximately Dollars. I will appreciate receiving your check if you are possibly able to do so at this time.

Everyone here appreciates the telegrams that we have been receiving on the rapid advance of your drilling program, and I have attempted to give it the widest distribution possible.

With kindest personal regards, I remain,

Sincerely yours,

JHM-mf.

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibits Nos. 184, 184-a. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

PLYMOUTH OIL COMPANY

Tucker 8494

911 Foreman Building

Los Angeles, California

November 28, 1938

Mr. J. H. Morgan

526 Utah Oil Bldg.

Salt Lake City, Utah

Dear Mr. Morgan:

I received your letter of the 25th with the financial statement inclosed. I will arrange this balance satisfactorily for you in the very near future.

Mr. Adkisson took me down yesterday for an interview with a Mr. Wooley who he had given, I believe, 10,000 shares of your stock and who had promised to run our stock up to ten cents a share. Mr. Wooley was much put out because we had advised the stock holders what we are doing for their benefit.

He said that he had sold these 10,000 shares of stock and gone back East to see the old stock holders, but was only able to buy, I believe he said 28,000 shares, at less than a cent and a half a share. He then said that the last letter sent out by you made it simply impossible to do any further business with them. He also stated that he was very sorry that if he had known you were sending out this letter he would have advised you not to do so.

I told him that I thought it was your intention to protect these stock holders against just such proceẽdure.

He claimed he had been down to see our well and was very well pleased but strongly urged us to never let the stock holders *now* when the well came in or in fact ever give them any information. Of course, I know that Mr. Adkisson planned that we would get some benefit from Mr. Wooley's connections, but Wooley very frankly told us, and he said he believed in being frank, just what he had been doing.

I wired you today that we were 4730 feet deep. We were compeled to throw out this old string of drill pipe and should have had this well finished about three days ago, at least cemented off on the sand. I think we will be on the top of the oil sand some time tomorrow and then we will have a very easy drilling from then on. I will, of course, keep you posted.

Sincerely,

E. Byron Siens

[Endorsed]: Securities and Exchange Commission.
Docket No. D515. Commission's Exhibit No. 91. In
the Matter of Union Assd. Mines Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

PLYMOUTH OIL COMPANY

TUcker 8494
911 Foreman Building
Los Angeles, California
December 7, 1938

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

My Dear J. H.:

We have had a rather hectic day and it is now five o'clock and Guy Davis is down at Mr. Lacy's, who arrived back by plane last night, but did not get to the office until this afternoon. So we have done nothing towards completing the well, but in fact, I did not expect to until tomorrow.

I inquired carefully into the stock situation from the Hogle Company and find the facts to be that there was 10,000 shares of Los Angeles stock sold in Salt Lake last week, but to offset this, the employees of Hogle and Company purchased for their own account, 15,000 shares in Salt Lake.

So that Wooley conversation was just hooey. I forgot to state that this 15,000 shares that they bought was sold by Salt Lake people to Los Angeles people. No doubt it was Mr. Wooley's stock.

We will not drill in this well, of course, until we have had some definite word from you regarding the proposed deal.

Very Respectfully,

E. Byron Siens
E. Byron Siens

EBS/AES

[Written]: Got \$2,000 from Lacy this morning.

[Endorsed]: Securities and Exchange Commission.
Docket No. D515. Commission's Exhibit No. 96. In
the Matter of Union Ass'd Mines Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

FRANK VELOZ,

a witness called by and on behalf of the Plaintiff, being
first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Frank Veloz. I live in Beverly Hills and I am a ballroom dancer, and I purchased about 25,000 shares of Union Associated stock. I know James Collins very slightly but prior to the purchase of that stock I had not known Collins. I had met him once at the Ambassador Hotel. I had known Joseph Murphy about 12 to 15 years, and I had a conversation with him with respect to the Union Associated Mines and the Plymouth Company, the first conversation being in the early part of 1939.

Q. Tell us what Mr. Murphy told you with relation to the securities of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.
[152]

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

(Testimony of Frank Veloz)

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objection runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken?

The Court: Yes.

Mr. Cannon: Thank you. (Tr. 957-958)

(Witness continuing)

Murphy was a good friend of mine and he told me he was associated in this particular proposition; that the chap involved did not have sufficient money to keep a contract which he had to purchase a certain amount of stock each month, and mentioned Collins' name. Murphy said that Collins had to purchase so many shares each month, and that he and Murphy didn't have sufficient cash so they needed \$1,000 to meet the obligation, and he told me that if I would let them have the \$1,000, he would pay it back in ten days or give me 25,000 shares of stock. I received that stock, but I did not receive back the \$1,000. It was a little bit confused as to the wells that were drilled, but it was said that they had a couple of wells already producing, and they were going to drill another one, and the stock was supposed to go on the Exchange. I think it was said that a few hundred gallons, that is from 1 to 300 gallons or barrels were being produced. [153] Murphy told me that the stock in a few days was going on the Salt Lake Stock Exchange, and it was going on at a higher price than I paid for it, and that he was going to dispose of some of the stock that he had and pay me back the \$1,000, or if I wanted to keep the stock, I could do that and make a profit on it. He said the stock

(Testimony of Frank Veloz)

would go on the Exchange around 6 cents. I do not recall ever meeting Barclay, president of the Salt Lake Exchange. Collins and Murphy had \$1,200 when they were in the lobby of the Ambassador Hotel, and I drew a check for \$1,000 and went into the branch bank in the Ambassador and the bank gave them a check for \$2,200. Only once did Collins participate in any of the conversations I had with Murphy, and that was in the lobby of the hotel. Collins merely corroborated Murphy's statements.

Mr.. Cannon: I will move to strike that out.

The Court: Oh, let it stand.

Mr. Cannon: Exception. (Tr. 961)

(Witness continuing)

The 21 certificates for 1,000 shares each which you show me represent 21,000 shares of stock that I obtained. I do not have the remaining certificates because Murphy told me that the Plymouth Oil Company was going to pay back some of the stock, and I went down to the Bank of America and deposited those stock certificates, and they sent me a check for \$141 and the balance of my stock.

(The documents heretofore marked Plaintiff's Exhibit 60, the 21 stock certificates, were received in evidence.)

Cross-Examination

By Mr. Cannon:

From time to time prior to these transactions in Plymouth Oil Company I had had experience in stock transactions. [154] Before becoming a professional dancer I worked in Wall Street in New York as a runner, or a messenger delivering stock. Prior to the conversation

(Testimony of Frank Veloz)

that I had with Murphy and Collins in the lobby of the Ambassador Hotel, I had already made arrangements with Murphy to buy this stock or to lend him the \$1,000, even before Collins ever came there. The representations that were made by Murphy concerning the listing of the stock, the drilling of the wells, and the production of the wells, were all told to me before I ever met Collins; and I agreed to let Murphy have this \$1,000 upon those representations, because of my friendship for Murphy. So when Collins came up and discussed the matter, it was only a matter of getting a cashier's check for \$2200. Murphy told me he was interested with Collins in this deal and in the Collins contract. (Tr. 963) Murphy and Collins spoke about the listing of the stock, and the production of the wells, when they were together in the lobby, and they were both very enthusiastic about it. Something was said about the well being on production and producing 200 or 300 barrels a day, and that they were going to drill another well. I was relying on my friendship with Murphy when I made this advance, I knew Collins only quite casually.

Cross-Examination

By Mr. Blue:

The 21,000 shares of stock that I have produced here do not stand in my name, but I believe the 4,000 shares that I turned in and upon which I had the return of \$141 and some cents did stand in my name, but I could not guarantee that, nor anything as to what was said four or five years ago. (Tr. 966)

(Witness excused.)

(At this point Mr. Manster read the following exhibits:) [155]

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

December 14, 1938

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

My Dear J. H.:

I wired you this morning about the well and while the tanks have not been strapped and are therefore not possitively accurate, we know what the well is doing, or in other words, that it is doing as much as we expected and is improving.

I hope that you will be able to come down either the end of this week or the first of next, as Mr. Gordon will be at home Saturday morning and we will have to close our new deal. I was thinking how very nice it would be if you could bring Billy Weeks with you.

I have several new ideas as to the manner in which we should drill the next well, none of which I would feel capable of explaining by letter. So I will wait until you come to see us.

Yours very respectfully,

E. Byron Siens.

E. Byron Siens.

P. S. When you do come down, would you please bring me some stationary of the Union Associated Mines Company. Thank you.

[Endorsed]: Securities and Exchange Commission.
Docket No. D515. Commission's Exhibit No. 97. In
the Matter of Union Assd. Mines Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

POSTAL TELEGRAPH
The International System

* * * * *

1938 DEC 14 PM 3 33

F 116 9—FN LOSANGELES CALIF 14 223P
J H MORGAN—

UTAH OIL BLDG SALT LAKE CITY UTAH—
WELL MADE 216 BARRELS YESTERDAY AND
IS IMPROVING WRITING—

E BYRON SIENS.

POSTAL TELEGRAPH
The International System

* * * * *

1938 DEC 15 PM 1 59

F 98 18 DL—FN LOSANGELES CALIF 15 125OP
J H MORGAN—

UTAH OIL BLDG SALT LAKE CITY UTAH—
WELL MADE 226 BARRELS A GAIN OF TEN
BARRELS IN LAST 24 HOURS. SEEMS, TO BE
STILL IMPROVING—

E BYRON SIENS.

Mr. Manster: I now read from Government's Exhibit 41 in evidence, a carbon copy of a report filed with the Division of Oil and Gas "Log of Oil or Gas Well":

"Well No. 1—"

I will read the whole thing:

"Operator, Plymouth Oil Company; Field, Torrance;

Well No. 1; Sec. 23; T. 4-S; R. 14W; S. B. B. & M. Location, 202 feet S. and 532 feet W. from c/1 of 236th Street and Eshelman Avenue; Date, September 26, 1939."

Mr. Cannon: September 26?

Mr. Manster: September 26, 1939:

"Commenced drilling, November 9, 1938; completed drilling, November 30, 1938; total depth, 5125 feet; plugged depth, 5125 feet; commenced producing, December 14, 1938; initial production, 124."

That is clean oil, barrels per day:

"Gravity clean oil, 27; per cent water including emulsion, 5; gas mcf. per day, 52."

Mr. Blue: Million cubic feet.

Mr. Manster: Oh, million cubic feet:

"Production after 30 days, 92 barrels of oil; gravity clean oil, 27; per cent water including emulsion, 5; gas, million cubic feet, 47." (Tr. 968)

Telephone No. 7714

P. O. Box 2040

HUGHES PETROLEUM COMPANY, INC.

Alexander Building

Abilene, Texas

Jan. 2, 1939.

Judge J. S. Morgan,
Utah Oil Building,
Salt Lake City, Utah.

Dear Judge:

I hurriedly read the lease covering the 40 acres at Devils Den, but I did not find a clause in the lease wherein the leasee agrees to pay all of the taxes including the landowners taxes on the 40 acres.

I asked Mr. Seins to insert the clause or correct the tax clause as it was written. I gave him the names and addresses on all the parties and he will get it signed.

I hope that everything goes as you anticipated and that you will be successful in getting the \$15,000.00 together in order to go ahead with the well on lot #41. You should get a good well on that lot, and while the property will naturally decrease, it should produce for a long, long time. In fact, it is one of the best locations in the Torrance, Lomita field.

I wish that you would drop me a line occasionally about the Union Mines Associated Stock.

Wishing you the complements of the season and a Very Prosperous New Year, I remain

Yours sincerely,

Fred V. Gordon

FVG:vo

[Endorsed]: Securities and Exchange Commission.
Docket No. D-515. Commission's Exhibit No. 47. In
the Matter of Union Assd. Date 11-7-40. Witness Gor-
don. Electreporter, Inc., Official Reporters, By Mid-
dleton.

POSTAL TELEGRAPH
The International System

* * * * *

1939 FEB 28 PM 1 43

F 81 34 SER—FN LOSANGELES CALIF 28 1152A
J H MORGAN—

UTAH OIL BLDG SALT LAKE CITY UTAH—
WELL NUMBER TWO FLOWING BY HEADS.
TURNED INTO TANKS YESTERDAY AFTER-
NOON. ACTUAL PRODUCTION MIDNIGHT TO
EIGHT AM. TODAY EIGHTY FIVE BARRELS
WHICH IS AT THE RATE OF TWO HUNDRED
FIFTY FIVE BARRELS PER DAY—

PLYMOUTH OIL CO.

January 9, 1939

Mr. E. Byron Siens
911 Foreman Building
Los Angeles, California

Dear Mr. Siens:

No doubt you have received the letters as changed. I hope that they are satisfactory and that you can use them to the best advantage.

As I wired you the papers are completed to make application for listing, and I feel more certain now that the hundred dollars for listing should be covered by a check from the Union Associated, and not a draft drawn on Plymouth Oil or yourself. I think we should keep the Union Associated and Plymouth divorced from each other as much as possible, and in that connection I hope that you are coming to Salt Lake in the near future, that I might have an opportunity to discuss with you the matters that have developed in making this application for listing.

The auditor who has had charge of preparing the application is quite familiar with the rulings and regulations of the S E C, and has made some pertinent suggestions, not only for Union Associated to follow, but I think, suggestions that would be extremely advantageous for the Plymouth Oil and its distribution of the 635,000 shares received on deal No. 1, and the 635,000 shares of stock it will receive in deal No. 2. So please advise me of the time you think you might be in Salt Lake. I am sure it would be better to discuss the matter with you than

with any one else, and it is practically impossible to discuss these matters by mail.

You must have been using too much money in paying off bills, or "taking some blond to dinner." Your check came back, and it was a little embarrassing to me, for I had cashed it with Mr. Val Snow's, one of the brokers who has purchased more stock than any one else. It just happened that he cashed a check for me in place of my deposit in the bank. It would really strengthen my position with Snow, if you would airmail a certified check.

The letters to the stockholders are in the mail, and naturally we expect some strength in the market upon receipt of the letters, but again I would suggest that if possible, a buying order for a few thousand be placed at Los Angeles, if you can get Collins to do so.

Hoping that you are satisfied with the progress at well No. 2, I remain,

Sincerely yours,

JHM-mf

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 191. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

January 10, 1939

Mr. J. H. Morgan

526 Utah Oil Bldg.

Salt Lake City, Utah

My dear Morgan:

Very sorry about the \$100.00 check incident; this occurred because all during the time Fred was here we were unable to write any company checks. By switching the checks around and taking up a number of small company obligations I got mixed up in my arithmetic. Guy is sending you under separate cover a letter and the contracts for the well and a \$150.00 check for your listing.

I am working very hard trying to get the forty acre lease all in order and will forward that on to you tomorrow, I hope!

The boys here are doing very well on the stock situation, but Mr. Adkisson, who has gone back to work for Marache & Co., has been injuring our market, but we shall have that all cleared up very shortly.

Very respectfully,

E. Byron Siens

E. Byron Siens

EBS*AES

Enc. \$100.00 Cashier Check

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 101. In the Matter of Union Assd. Mines Co. Date 11-22-40. Witness Davis. Electreporter, Inc., Official Reporters. By Morris.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

January 3, 1939

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

My Dear J. H.:

We are anxious to have a quotation in the papers here daily of what the Union Associated Mines stock situation was in Salt Lake and I want you to go see Mr. Barclay and ask him to please give range and sales of Union Associated Mines in press release daily.

This will help us down here to a great extent that is people here can see that there is action and if there action it will stimulate buying.

We are anxious to have a copy of your letter to the stock holders for two reasons, due to getting the stock transferred to the new owners and the other is to know who our people are.

We are held up today waiting for Mr. Lacy as he was delayed in Arizona yesterday and did not get back to his office yet today, but we will get there without delay as Fred is not here to stall us.

You can see now how Mr. Barkley can help up as these newspapers will not give any stock quotations from brokers and will only take the same from the Presidents of Exchanges so you can see that Mr. Barkley can be of tremendous aid to us.

I am very glad to report that we did get one tank of oil shipped before New Years Day and we are shipping another tank today. I am also glad to report that our oil is 28 gravity instead of 25. We don't get any more for this but it gives a larger margin of safety.

Very Sincerely yours,

E. Byron Siens

E. Byron Siens

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 98. In the Matter of Union Assd. Mines Co. Date 11-22-40. Witness Davis. Electreporter, Inc., Official Reporters. By Morris.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

January 4, 1939

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

My dear J. H.:

Just received your letter with the 102 stock certificates which are all in order and for which I thank you.

Everything here is running fine and we are going to have a market very quickly as I see it. *On* thing, though happened that I don't like and that was Hogle and Company have always been very friendly and called up two or three times a day while the well was drilling and two

of the boys in their office bought stock personally, but something or other happened to upset the situation over there.

Today a client of ours ordered 5000 shares to be purchased in Salt Lake through Hogle and Company and they refused to execute the order. I immediately called up Whittaker of their office to get the reason and he was at home sick so I did not talk to any other person at the office, but would like you to have Barclay talk to Hogle and find out what the matter is. You can feel free to ask the aid of Barclay at any time as I am going to see him later as explained to you, however, don't use my name with him.

We are waiting for the letter to the stock holders and will be able to get all this stock transferred to the right owners in time for the dividend. Also you will be needing to know about these stock holders for the annual meeting. I am still trying to find a suitable president for the Company, but we could do a lot worse than Billy Weeks.

If I don't find a big oil man, I think we will make him the President. In some ways I would like to have the president here as it sounds better to the Salt Lake people to have a big man in California doing things for them, whereas they don't think Billy Weeks can do much. I would like to be their President myself, but it is much better for me to be in the background and to have a more prominent man as President, but I don't know just how to get him.

Of course, Mr. Bray is all right in many ways, but he thinks I should pay all his bills for holding such an important position. It is tough enough to drill wells without money, but it is tougher to have to pay the President

too. His rent is \$70.00 per month, whereas my rent is only \$55.00 but of course he is a big oil man and that makes some difference.

Well, before the end of this year we will have lots of fellows who will be glad to be our President because we will have a dividend record then. These two wells will make us a sure shot, because if any thing happens to either of the wells, the dividends still go on. I would rather have three, one hundred barrel wells, than one, five hundred barrel well; because the income can never completely stop.

Now here is something I want you to do for me. I want you to go and see Mr. Barclay and tell him that when Mr. James H. Collins orders him to sell any number of shares up to 50,000 to proceed with the sale and that you guarrantee delivery. Don't usse my name, but I am guarranteeing this delivery through you. Barclay does not know Collins, but he is going to talk to Barclay tonight and introduce himself over the phone.

Sincerely yours,

E. Byron Siens.

E. Byron Siens.

EBS*AES

[Endorsed]: Securities and Exchange Commission.
Docket No. D515. Commission's Exhibits Nos. 99, 99A.
In the Matter of Union Assd. Mines Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

PLYMOUTH OIL COMPANY

TUcker 8494

911 Foreman Building

Los Angeles, California

January 12, 1939

Mr. J. H. Morgan
526 Utah Oil Bldg.
Salt Lake City, Utah

My dear J. H.:

I had Mr. Milliner mail you the lease on the forty acres and he did not attach a copy of his lease because his lease, as you know, is executed by Fred V. Gordon and his wife. I did not think it wise to send in a copy of same.

When Mr. Milliner's lease is recorded in Kern County, I will let you know and you can forward your lease down have it recorded.

With reference to the paper you wish signed by the Plymouth Oil Company I have executed another document showing how you are to pay the 635,000 shares of stock to the Plymouth Oil Company.

I do not suggest that you issue any of these shares at the moment, of course Mr. Millner will need, very soon, his shares but he will notify you at what time he wants them.

Very Respectfully,

E. Byron Siens

EBS*AES

I was in a hurry to get the papers up to you & Davis was not here so only Fischgrund signed with the seal if you want Guy to sign send it back.

I note Fischgrund signed for Davis.

E. B. S.

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 102. In the Matter of Union Assd. Mines Co. Date 11-22-40. Witness Davis. Electreporter, Inc., Official Reporters. By Morris.

January 17, 1939

Mr. E. Byron Siens
911 Foreman Building
Los Angeles, California

Dear Mr. Siens:

The Board of Governors passed the Union Associated for listing today, so that job is all over very nicely. In view of your letter, it looks like we can go on the San Francisco Exchange.

Please tell the boys to work exceptionally careful so that no question can be raised about "wash sales". There seems to be some question in the minds of the Listing Committee about Hogle's report on "wash sales". With this stock listed on both Exchanges, we will have a wonderful opportunity to make a fine Company; so let's not take any chances of having a stop-order come through.

I will write you more in detail tomorrow.

Very truly yours,

J. H. Morgan

JHM-mf

[Endorsed]: Securities and Exchange Commission. Docket No. L515. Commission's Exhibit No. 195. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

January 17, 1939

Mr. Fred V. Gordon
612 Subway Terminal Bldg.
Los Angeles, California

Dear Mr. Gordon:

Thinking you were in Texas, I mailed the annual tax statement for the Overland Petroleum Company to you there. It may be forwarded to you, but, in the event that it is not, please advise me if you desire to keep the Overland Petroleum Company a going concern. In the event that you do, please mail me \$20.00, and I will secure a new tax form and pay the annual tax fee.

In my Texas letter, I also advised you that it would be impossible to complete my deal on Lot 41. It really looked an excellent one to me, and because it looked so good, I had made three trips to Los Angeles and spent considerable money toward closing the deal. I could have gotten \$2,000 or \$3,000, but I did not want to go in the deal that way, and I am sure that neither you nor Mr. Lacey would appreciate having the deal stalled along as the Logan Petroleum deal was. I hope that you presented the matter to Mr. Lacey as you and I went over the deal in your office.

We expect the approval of the Listing Committee on the Union Associated today. No doubt Mr. Siens has advised you that the San Francisco Exchange has invited us to list on their Exchange. They will do this for a fee of \$100, instead of the regular \$300.

The minute a little buying support comes from Los Angeles, I am sure that considerable stock will be purchased here. This support should come at the time the stock is listed if it is to do the most good.

Trusting you are feeling well, and with kind personal regards, I remain,

Very truly yours,

J. H. Morgan

JHM-mf

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibit No. 48. In the Matter of Union Assd. Date 11-7-40. Witness Gordon. Electreporter, Inc., Official Reporters. By Middleton.

January 18, 1939

Mr. E. Byron Siens
911 Foreman Building
Los Angeles, California

Dear Mr. Siens:

As I was explaining to you on the phone, the Listing Committee approved the stock for listing and it was sent to the Governing Board yesterday. The Governing Board also approved the stock for listing. I am mailing the form 10 K to the S. E. C. today; this was done pursuant to our understanding with the Salt Lake Exchange that the stock would be listed before sending our report to the S. E. C. In other words, they desire that the stock be listed on the local Exchange before the S. E. C. starts stalling for time. If we had made our report to the S. E. C. first, we might have been answering questions for six months before we could have listed.

Mr. George J. Flach of San Francisco advised me that he purchased 20,000 shares of Union Associated stock at 2½ cents with the understanding that the stock was go-

ing to be listed on the San Francisco Exchange. Mr. Carter, secretary of the Exchange, had advised Mr. Flach of our entention to list the stock. Mr. Flach is desirous of making some connection to handle the stock in San Francisco. I suggest that you contact him. Any one who would purchase 20,000 shares on the basis he did looks like a *dam* good prospect. His address is 166 Montgomery Street, and his telephone is Douglas 3173.

You have not yet answered me on the Mrs. Willis E. Hutchason stock.

Be sure and let me have some report on the present condition of well No. 1 and what you are doing on well No. 2.

I just talked with Mr. Barclay and he confirmed my statement that it is not necessary to have a bank act as transfer agent in order to be listed. However, I think that we should do so as soon as we feel that we can afford to pay approximately 67 cents per thousand shares for transfers. I thought we had better wait until the second well is paid for because the cost of transferring the new 635,000 shares would be considerable money.

With kindest regards, I remain,

Sincerely yours,

JHM-mf

[Endorsed]: Securities and Exchange Commission. Docket No. D515. Commission's Exhibit No. 196. In the Matter of Union Asso'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

February 14, 1939

Mr. Guy B. Davis
Plymouth Oil Company
911 Foreman Building
Los Angeles, California

Dear Mr. Davis:

I received your letter with the instructions to make out the 40,000 shares Mr. Seins left with me. However, I received further instructions from Mr. Seins to delay making up the certificates, until further instruction from him. No doubt he has advised you of his present plans, but in the event that he has not, this paragraph will be an explanation of my delay in forwarding the stock to you.

Will you please advise me, airmail, the amount shipped from well No. 1 to the Standard Oil during the month of February, to date.

We would appreciate an airmail letter, advising us of the present status of well No. 2, and particularly in regard to the bottom sand below 5124 feet.

The stock situation is looking much better here, and I am sure that if the leak could be stopped through Pierce and Company, the market price would be at least 5 cents here in a very short time.

With kindest personal regards to all, I remain,

Very truly yours,

J. H. Morgan

JHM-mf

[Endorsed]: Securities and Exchange Commission.
Docket No. D-515. Commission's Exhibit No. 56. In
the Matter of Union Associated Mines. Date 11/15/40.
Witness Electreporter, Inc., Official Reporters.
By Oyler.

SIDNEY FISCHGRUND

Attorney at Law

707 South Hill Street

Los Angeles

TUcker 6031

May 10, 1939.

Mr. J. H. Morgan

Attorney at Law

526 Utah Oil Building

Salt Lake City, Utah

Dear Mr. Morgan:

This is to acknowledge receipt of your letter dated May 8, 1939, advising me that the stockholders meeting of the Union Associated Mines Company was held and a resolution adopted making the stock non-assessable.

The form A-1, which was received by me some time ago was promptly delivered to Mr. Guy B. Davis, with the request that he supply the information and data that is to be furnished by the Plymouth Oil Company. I spoke to him again today about this matter and showed him your letter, and at present I am patiently waiting until he furnishes me with this information in order that I may promptly forward it to you. In the meantime, I am making an effort to work out a deal whereby the Union Associated Mines Company would acquire a lease on property in Montebello. In view of developments in this field, I believe a lease in this area would prove to be very valuable to the company.

As soon as the form A-1 is completed and after I obtain the information regarding this Montebello field, I may take a trip to Salt Lake City in order to discuss these matters with you personally.

Very truly yours,

Sidney Fischgrund
SIDNEY FISCHGRUND

SF/b

[Endorsed]: Securities and Exchange Commission.
Docket No. D-515. Commission's Exhibit No. 110. In
the Matter of Union Assd. Mines Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

SIDNEY FISCHGRUND
Attorney at Law
707 South Hill Street
Los Angeles
TUcker 6031

May 18, 1939.

Mr. J. H. Morgan
Attorney at Law
Utah Oil Building
Salt Lake City, Utah

Dear Mr. Morgan:

This is to acknowledge your letter dated May 15th, which I have forwarded to Mr. Davis, with a request that he please furnish you with the information you desire. It will be necessary for him to supply this information. He has been working on the books and has not

completed his audit so as to be able to give me the necessary data to be incorporated in the Form A-1.

I have been in touch with Mr. Davis and understand that an attempt has been made to obtain property in the Montebello field for the Union Associated Mines Company.

I have been kept very busy which accounts for the fact that I haven't had much time to go into these matters with Mr. Davis and Mr. Schirm.

Kindest personal regards.

Very truly yours,

Sidney Fischgrund

SIDNEY FISCHGRUND

SF/b

[Endorsed]: Securities and Exchange Commission.
Docket No. D515. Commission's Exhibit No. 111. In
the Matter of Union Assd. Mine Co. Date 11-22-40.
Witness Davis. Electreporter, Inc., Official Reporters.
By Morris.

Tulsa, Oklahoma.

May 15, 1939

Mr. J. H. Morgan,
526 Utah Oil Building,
Salt Lake City, Utah.

Dear Judge:—

I thank you for your letter of May 8th which was forwarded to me at this point.

I note the copy of the letter that Mr. Crapo wrote to Mr. Christion Vrang who is located at the Swift

Hotel, Knoxville, Iowa. I talked to Mr. Vrang about the alkali creek structure and he could not remember very much about it. He looked through his papers and was unable to find any report that he had made regarding the property but told me to look through his things at Abilene and I might be able to find it there. Mr. Crapo's letter will probably help him remember something about the structure.

I am not so sure now of being able to interest Mr. Phelan in drilling the alkali structure as he has invested such a large amount of money in a water bleeder that he desires first to recover some of that. I have, however, not given up and it may be that he will receive payment of several hundred thousand dollars on a government contract he has been working on sometime the latter part of this month, in which event I am sure that he will come in providing Vrang's report is good. Mr. Phelan is meeting me here Tuesday or Wednesday of this week and will accompany me to Abilene to look over the work we have been doing there. In event he does receive his money and come in we will organize a new company to develop several pieces of property at one time which, of course, would include your alkali dome. I will know within the next 10 days whether or not the deal goes over and if there is any question about it I will take the matter up with other parties.

I note that you held a stockholder's meeting of the Union and passed a resolution making the stock non-assessable. I wish you would kindly mail me a copy of the prospectus when completed. I have not heard from the boys in Los Angeles in reference to the engineers or geologists report on No. 1 and No. 2 but am quite sure they are looking after it. I hope this matter gets in shape

so there will not be any further delay in the marketing of that stock and making a success out of the company.

Mr. Vrang and two lease men are engaged at the moment in leasing up several hundred thousand acres of land in the western part of Iowa which Vrang likes the looks of very much and, while it is rather difficult to trace out the geology, he is making considerable headway.

Thank you for enclosing the clipping about J. C. Anderson moving in a rig at Dry Piney. I was talking to the Texas Company and they told me about drilling at around 7300 feet with hopes of getting a good oil producer. They have had a great deal of gas heretofore.

With best wishes, I am.

Yours sincerely,

Fred V. Gordon

FVG'c

[Endorsed]: Securities and Exchange Commission. Docket D515. Commission's Exhibits Nos. 211, 221a. In the Matter of Union Ass'd Mines. Date 1/20/41. Witness Morgan. Smith & Hulse, Official Reporters. By Garnett.

(Mr. Manster also at this point read from Government's Exhibit No. 41, the report filed with the Division of Oil and Gas, as follows:)

Operator: Plymouth Oil Company. Field: Torrance. Well No. 2. Sec. 23. T. 48. R. 14W; dated June 20, 1939. Commenced drilling Jan. 28th, 1939. Completed drilling: February 23rd, 1939; Total depth: 5156; Plugged depth: 5156; Drilling tools: Rotary; Junk: Well completed; Commenced producing Feb. 28th, 1939; Initial

production: 156 barrels Clean Oil per day; Gravity Clean Oil: 26; Per Cent Water including emulsion: 40; Production after 30 days: 118 barrels Clean Oil per day; Gravity Clean Oil: 26; Per Cent Water including emulsion: 40; Gas Mcf. per day: 77. (Tr. 971-972)

C. H. LAUDER,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is C. H. Lauder, and I am a physician and surgeon, and I live in Arcadia, and I am acquainted with James H. Collins, and I am a purchaser of stock of Union Associated Mines. I purchased this the first part of February, 1939, it being 10,000 shares and I paid \$400.00 for it. Collins came to my office in company with Mr. Tessier with whom I was acquainted, and with whom I had had numerous stock dealings prior to that time. I had never met Collins before and Tessier introduced him to me. Collins stated he had some [157] good oil stock of the Union Associated Mines Company that he could sell for \$400.00 for 10,000 shares. He said it was a very good investment and that I would double my money in the next thirty days; that they were drilling for oil and that the well would come in within a short time and that the stock would go up in price. I relied upon the statements made by Collins because Tessier had been very honest with me before and I believed Collins because Tessier sort of vouched for him. I still have my stock, but I do not have it with me. My attorney has it. (Tr. 993)

(Testimony of C. H. Lauder)

Cross-Examination

By Mr. Blue:

The kind of stock that I had purchased from Mr. Tessier I do not suppose was very good stock. During my career I have bought and purchased stock on many occasions. I had not discussed Union Associated Mines with Tessier before I met Collins. Collins mentioned it to me before Tessier said anything about it. I do not recall that Collins at any time told me that the Union Associated Mines had any interest in an oil well that was producing at Torrance, but he told me at that time that a well was being drilled by Union Associated Mines Company. That conversation was five years ago, and I do not recall a lot of things. I do not remember that he told me that there was a producing well in which Union Associated had a 50 per cent interest. Collins did not state anything, as I recall, about a 50 per cent interest in any oil well. I bought my stock merely on the theory that I would turn over my money for a higher price than what I was paying for the stock, in a short time. I did not buy it as an investment, but bought it as a speculation. I had faith in Mr. Tessier. Reed Drug Company stock, and Liberty Loan Company stock, that I bought through Mr. Tessier, have been sold by me for less [158] than I paid for them. I discussed this matter with Mr. Evans before I testified here, and I gave a statement to the Securities Exchange Commission in reference to this particular transaction, several months ago, but Evans did not refresh my memory as to what happened five years ago. A discussion occurring five years ago is very hard to remember verbatim. (Tr. 997) Something was said about listing this stock on the Salt Lake Stock Exchange.

(Testimony of C. H. Lauder)

My transaction was on February 4. I do not remember that they told me that the application had been approved by the Board of Governors on the Salt Lake Stock Exchange. I do not know when I received that information. I sued Mr. Collins. I am not unfriendly with him, but I do not like to have anybody tell me something that is not so. I do not know, as a matter of fact, whether everything he told me was so, but he certainly has not been very friendly with me.

Cross-Examination

By Mr. Cannon:

As a matter of fact, Mr. Tessier has been a confident of mine for quite a long time, prior to the time that I bought this stock, and was acting as my agent in a number of transactions; and I had every reason to believe in Collins because Tessier vouched for him, and I took Tessier's statement as to Mr. Collins' integrity and I did not know Mr. Collins any more than I know you. I relied a great deal on what Mr. Tessier told me because he had been very honest with me. Only on one occasion have I ever found him to be otherwise; and that occasion was when he vouched for Collins.

Q. What did Mr. Collins tell you that wasn't true?

A. I know he got my \$400.

Q. What did Mr. Collins tell you that wasn't true?

A. I don't know. (Tr. 1000)

(Witness excused.) [159]

MILTON A. CRYDEMAN,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Evans:

My name is Milton A. Crydeman and I am manager of the Foreman Building, in Los Angeles, and have been so for nine years. In the latter part of 1938, Sidney Fischgrund was a tenant of the building and had a suite at 905. The Plymouth Oil Company had a suite in that building between 1938 and 1939, from September 1 to March 31. The Plymouth Oil took over a lease formerly made by the Commercial Oil Company. In my capacity as manager of the building, I conducted my business for the Plymouth Oil Company with Mr. Siens. The Plymouth Company occupied rooms 910 and 911. I do not recall a Mr. Millener, but the name sounds familiar. Our records show that Millener was in suite 910 and 911.

Cross-Examination

By Mr. Blue:

I have known Sidney Fischgrund probably 10 years and he is still a tenant in my building, and I know his reputation in the community for truth, honesty and integrity. It has always been first class in my relations with him.

(Witness excused.)

At this time Mr. Manster read certain Exhibits, as follows:

On the stationery of J. A. Barclay & Company, "Stock Brokers and Dealers in Securities, Member Salt Lake Stock Exchange," the 6th of January, 1939, from J. A. Barclay to James H. [160] Collins, contained in Government's Exhibit No. 26 in evidence:

"Dear Mr. Collins:

"Enclose statement of the sale of 1,000 shares UNION ASSOCIATED at $2\frac{1}{2}\phi$ per share.

"Yesterday afternoon, the stock sold at 2ϕ and today at $2\frac{1}{4}$ and $2\frac{1}{2}\phi$, these sales being by one of the wire houses.

"The report should be in the hands of the stockholders by Monday, and we look for a stiffening of the market and tomorrow we expect the market to be $2\frac{1}{4}$ @ $2\frac{3}{4}\phi$; buyers can, of course, alter this.

"We like the report and believe that when stockholders become fully advised of the company's conditions and a little publicity is used, there should be an upward trend in the market.

"Looking forward to the pleasure of seeing you next week, we are

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay (s)"

On the stationery of J. A. Barclay & Company, dated the 14th of January, 1939, from J. A. Barclay to J. H. Collins:

"Dear Mr. Collins:

"As per your verbal instructions of yesterday's date, we today delivered to Mr. J. H. Morgan, Utah Oil Bldg., this city, three thousand shares UNION ASSOCIATED MINES COMPANY stock—certificates Nos. 3763, 3766 and 3767 each for 1,000 shares.

"This now leaves twenty-one thousand shares Union Associated Mines Company stock which we are holding to your order. [161]

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay" (s)

On the stationery of J. A. Barclay & Company, the 18th of January, 1939, to Mr. J. H. Collins:

"Dear Mr. Collins:

"Acknowledging your wire of today's date as follows:

" 'If possible include sales of Union in list of sales released daily to Press suggested you not sell any stock under two and three quarters many thanks for your kind wire answer by Western Union Collect'

"There was no active market in UNION ASSOCIATED today and one sale @ $2\frac{1}{2}\phi$ per share, so we are quoting the market $2\frac{1}{4}$ @ $2\frac{3}{4}\phi$, and in ac-

cordance with your suggestions, will not sell any of your stock under $2\frac{3}{4}\phi$ per share.

"As regards having the sales of Union Associated in the Salt Lake papers at the present time, it is just an impossibility. We have a list on the Exchange, as you will see from the enclosed quotation sheet, of unlisted stocks, but they are unlisted under the sanction of the SEC and the papers do not carry a story even of the Governing Board approving of their listing until they see what the SEC does.

"As usual, the offers at $2\frac{1}{2}\phi$ came out of Los Angeles. I just wished they would dry up down there and give the market a chance.

"Please advise me when they start drilling on Well #2.

"It is a good thing for me to have your office address, as then I can reach you by wire or telephone [162] more quickly.

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay" (s)

On the stationery of J. A. Barclay & Company, January 24, 1939, from J. A. Barclay to James H. Collins:

"Dear Mr. Collins:

"As per your verbal instructions of yesterday's date, we today delivered to Mr. J. H. Morgan, Utah Oil Bldg., this city, TWENTY THOUSAND (20,000) shares UNION ASSOCIATED MINES COMPANY, stock certificates Nos. 3901, and 3770 to 3788, inc., for 1,000 shares each..

"We also gave Mr. J. H. Morgan our check in the amount of \$45.00 which is the amount we were holding to the credit of your account.

"This now completes delivery of all stock we were holding to the credit of your account.

"This now completes delivery of all stock we were holding to your order, and squares all transactions to date.

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay" (s)

On the stationery of J. A. Barclay & Company, dated January 26, 1939, to Mr. James H. Collins:

"Dear Mr. Collins:

"UNION ASSOCIATED closed at .02 @ $2\frac{1}{4}\phi$ today, the only sale being 1,00 shs. @ $2\frac{1}{4}\phi$.

"Don't know whether it will interest you, but [163] we can sell 5,000 shares @ .02. If you wish to do this, wire before noon tomorrow.

"These markets are very discouraging, as they are creating a feeling among investors that they do not want to do anything. However, they will change and meantime if your people will lay a solid foundation in the case of the market for Union Associated they will do much better than trying to push things over quickly.

"With kindest regards, and will be glad to hear from you at anytime,

"Sincerely and cordially,

"J. A. Barclay" (s)

On the same stationery, January 28, 1939, to Mr. James H. Collins:

"Dear Mr. Collins:

"Confirming our telephone conversation of yesterday, and enclose herewith statement for the sale to us of 5,000 shares UNION ASSOCIATED @ .02.

"As we understand it, someone is going to deliver to us 10,000 shares Union Associated stock, and you are sending us a check for \$100.00 to pay for 5,000 shares, and hold that stock to your order.

"With best wishes,

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay" (s)

On the same stationery, February 1, 1939, to Mr. James H. Collins:

"Dear Mr. Collins: [164]

"We finally arrived at the conclusion of the deal, and cannot understand the position of Pierce & Company as Ure, Pett & Morris instructed me that they had *wire* them to take the stock with Assessment No. 8 paid, delinquent May, 1935, and charge it to their account.

"We enclose statement for the sale of 5,000 shares as indicated in our telephone conversation, and sold

it to a broker who is quite interested in the company and whom I hope to have with me Saturday.

“Trusting that from here on you and I will have no more worries and troubles.

“Kindest regards!

“Cordially and sincerely,

“J. A. Barclay” (s)

On the same stationery, to Mr. James H. Collins:

“Dear Mr. Collins—”

Mr. Blue: What is the date?

Mr. Manster: February 9, 1939:

“Herewith stock certificates Nos. 4127 to 4131, inc. for 1,000 shares each, making 5,000 shares UNION ASSOCIATED MINES COMPANY issued in the name of Matthew McCarthy, and there is a balance due us of \$10.00 which we have charged to your account.

“We also enclose stock certificates Nos. 3975 to 3989, inc. for 1,000 shares each, making 15,000 shares UNION ASSOCIATED MINES COMPANY, these shares all coming from your stock which we were holding to your order a total of 10,000 shares.

“The market today—all trades @ $2\frac{1}{2}\text{¢}$ —closing $2\frac{1}{2}$ @ $2\frac{3}{4}\text{¢}$. [165]

“Kindly acknowledge receipt of above certificates.

“Very truly yours,

“J. A. BARCLAY & COMPANY

“By J. A. Barclay” (s)

On the same stationery, to Mr. James H. Collins:

“Dear Mr. Collins:—”

Mr. Blue: What is the date, please?

Mr. Manster: February 11, 1939:

“As per telephone conversation of today’s date, we herewith enclose stock certificates Nos. 4065 to 4069, inc., and 3998, 3999, 4001, 4002, and 4003, all for 1,000 shares each, making a total of 10,000 shares UNION ASSOCIATED MINES COMPANY.

“This is all the stock which we were holding to your order, and as regards your balance, you owe us \$11.04, \$10.00 being commission on the McCarthy stock, and \$1.04 being revenue stamps on the two lots of 5,000 shares sold. Kindly send us check to square.

“Very truly yours,

“J. A. BARCLAY & COMPANY

“By J. A. Barclay” (s)

On the same stationery, February 16, 1939, to Mr. James H. Collins:

“Dear Mr. Collins:

“We today had the check returned to us in the amount of \$375.00 which was dated February 6th, and which was returned having been protested.

“The cost of the protest was \$2.50 which we have charged to your account, making a total balance [166] owing us of \$13.54.

"Kindly send check for this amount as we do not like these balances hanging over.

"Union Associated was $2\frac{1}{4}$ @ $2\frac{1}{2}\phi$ today.

"Very truly yours,

"J. A. BARCLAY & COMPANY

"By J. A. Barclay" (s)

Government's Exhibit No. 48, in evidence, a letter upon the stationery of Union Associated Mines Company, dated September 20, 1939, addressed to Mr. Erlene B. Bates, 921 South Spaulding Ave., Los Angeles, California:

"Dear Sir:

"You have been sent your check on Certificates No's. 4040 to 4050. Of course, we can do nothing about your other seven certificates until they are in either your hands or ours.

"We have heard nothing from Mr. Metcalf here at our office. If you could give us the names on the certificates and the numbers, of course there might be some way to check the matter satisfactorily.

"Very truly yours,

"Margaret Florence (s)

"Transfer Agent."

Government's Exhibit No. 52, in evidence, confirmation upon the stationery of R. L. Colburn Company, Brokers, Members of San Francisco Mining Exchange, San Francisco, California, addressed to Frank L. Tucker:

"As agent we have this day purchased for your account

"5,000 Union Assoc., Price .02¾, Amount 137.50,
Commission 10.00, Amount 147.50. [167]

"Yours very truly,

"R. L. COLBURN COMPANY

"By R. Evans." (s)

Government's Exhibit 59, in evidence, a letter upon the letterhead of Plymouth Oil Company, dated February 6th, 1939, addressed to Mrs. Erlene Bates, 921 South Spaulding Drive, Los Angeles, California:

"Dear Madam:

"You will please find enclosed 17,000 shares of Union Associated Mines Company stock, which has been issued in your name.

"Very truly yours,

"PLYMOUTH OIL COMPANY

"By-Guy B. Davis." (s)

WILLIAM H. O'BRIEN,

a witness called by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Manster:

My name is William H. O'Brien, and I am living in Los Angeles, and I am Associate Securities Investigator for the Securities and Exchange Commission (Tr. 1018) and have held that position seven years. Under instructions, I called at the office of the Plymouth Oil Company and made an inspection of certain records. I also went to the Subway Terminal Building and examined certain records furnished me by Guy Davis. I examined Govern-

(Testimony of William H. O'Brien)

ment's Exhibit No. 40, purporting to be a daily pumpers' report for Plymouth Wells Nos. 1 and 2, and a tank gauge formula. I made a transcript thereof, embracing two schedules which you now show me. Confining [168] my testimony to Well No. 1, and giving you first the total production for each month, starting with December, 1938, and continuing through December, 1939, on Well No. 1, as well as the highest daily production during each month, it shows on December, 1939, a total of 1751.07 barrels were produced. January, 1939, 2581.04. The highest days pumping 120.03. February, 1919.05 barrels. The highest days pumping 77.05; March 1064.05 barrels. The highest pumping 65.06; April 1158 barrels. The highest days pumping 107 barrels; May 1130 barrels. The highest days pumping 40 barrels. June 950 barrels. The highest days pumping 36 barrels; July 920 barrels. The highest days pumping 41 barrels; August 792 barrels. The highest days pumping 37 barrels; September 692 barrels. The highest days pumping 30 barrels; October 424 barrels. The highest days pumping 28 barrels; November 74 barrels. The highest days pumping 16 barrels; December 248 barrels. The highest days pumping 16 barrels. (Tr. 1023) And as to well No. 2, it appears that the first month shown me was of April, 1939, 2817 barrels. The highest pumping 118 barrels; May, 1939, 3133 barrels. The highest days pumping 108 barrels; June, 2630 barrels. The highest days pumping 102 barrels; July 2504.05. The highest days pumping 105 barrels; August 2248.05. The highest days pumping 77½ barrels; September, 2091 barrels. The highest days pumping 92 barrels; October, 860.05 barrels. The highest

(Testimony of William H. O'Brien)

days pumping 75½ barrels; November, 241 barrels. The highest days pumping 81 barrels; December, 396 barrels. The highest days pumping 20 barrels. (Tr. 1024)

Cross-Examination

By Mr. Blue:

Prior to being with the Securities & Exchange Commission, I was in the brokerage business, but did not sell [169] stock. I did accounting work and office management. I have been a witness for the prosecution on a few occasions. My records as to Well No. 2 start in April. The record before April was not there. March was missing. Whatever records I got I got voluntarily from the Plymouth Oil Company. There was no argument about it. I did not check the records against the records of the Standard Oil Company (Tr. 1027). I was not interested in the shares of stock that the Plymouth Company owned. I know nothing about the actual production of the well except what is shown on the records. I have added them only (Tr. 1033), and I have done some multiplying.

Q. By Mr. Blue: * * * I want to direct your attention to this particular report dated, as you will note, December 28, 1938, and to this one also dated December 28, 1938, and you will note following that that we have December 30, 1938. Now, will you kindly point out to me on your recap where you have included the report that I am now directing your attention to in this particular exhibit?

(Testimony of William H. O'Brien)

Mr. Cannon: The exhibit number is what, for the record?

Mr. Manster: 40.

* * * * *

Q. By Mr. Blue: That is a report headed, "Lease, Plymouth Oil Company, Well No. 1," dated December 28, 1938, "Tour 12 to 8," Barrel $6\frac{1}{4}$, Barrel $6\frac{1}{4}$, and Barrel 6.

Will you kindly show me where that is on your report?

A. The 28th, I have—

Q. As a matter of fact, you haven't got it there? Have you got that in your report?

A. No, there is only one 28th in here.

Q. Then that particular pumpers' report is not included [170] in your summary, is that correct?

A. No, because I took the first one I found.

Q. Did you ask anybody as to whether or not it might have been a mistake, and might have been 12/29?

A. No, I did not.

Q. You just excluded it entirely?

A. That is right. I thought it was a duplicate or a corrected one, although nothing was said about it.

Q. Then you knowingly excluded it?

A. Yes.

* * * * *

Q. You are an accountant, are you, and you say if you did not include it in there, that makes it something less?

* * * * *

A. I say, my summary is less by not including it.

(Testimony of William H. O'Brien)

Q. And if this had been in there your summary would have been greater? A. That is right. (Tr. 1035-1036)
(Witness continuing)

Cross-Examination

By Mr. Cannon:

This record shows that the first oil was produced or pumped from Well No. 1 on December 15, 1938.

Mr. Cannon: Now, at this time I want to read into the record a telegram or two before I go back to the witness from the exhibit. * * * December 12, 1938, a telegram to J. H. Morgan, Utah Oil Building, Salt Lake City, Utah, from E. Byron Siens; first, there is one at 5:12 a.m. on that date of December 12th:

"Well flowing by heads but still swabbing occasionally at midnight Sunday night. Cleaning up very fast. Unable to determine at this time exact production. Will wire you [171] later Monday.

"E. BYRON SIENS."

The next one is a telegram, Postal Telegraph, dated December 12, 1938, 11:23 a.m., addressed from Mr. Siens to Mr. Morgan:

"Swab machine broke down at 7:00 a.m. but the well still flows by heads. Have not turned into tanks yet and it will perhaps be 24 hours before we know exact daily production. Personally I am pleased.

"E. BYRON SIENS."

(Testimony of William H. O'Brien)

Another one, December 12, 1938, 1:05 p.m., addressed to Mr. Morgan from Mr. Siens:

"Have not swabbed since 7:00 o'clock but well is now flowing every 15 minutes, showing hourly improvement.

"E. BYRON SIENS."

December 12, 5:43 p.m., to Mr. Morgan from Mr. Siens:

"Well has been flowing steadily for over an hour.

"E. BYRON SIENS."

December 13, 1938:

"We installed a \$4,000 Lacy bulldog pumping unit this morning at 9:00 o'clock. Well still flowing by heads. Will give you tomorrow definite output." (Tr. 1037-1038-1039)

(Witness continuing)

Up to December 31, 1938, the pumpers' records embracing Government's Exhibit 3 show that Well No. 1 had produced 1751.7 barrels, which is 249 barrels less than 2,000. So, to this 1751.7 barrels there must be added 99.6 barrels, covering the oil produced on the 28th of December, and that [172] would make 1851.3 barrels, but that does not take into consideration anything that the well produced between the 12th of December and the 15th of December, because there were no reports for it (Tr. 1040). I could not say whether Mr. Morgan's letter of January 6, 1939, Government's Exhibit 3, to the effect

(Testimony of William H. O'Brien)

that as of December 31, 1939, 2,000 barrels had been produced, is correct or incorrect. (Witness excused).

Mr. Cannon: Without requiring the prosecution to produce the witness, we will stipulate that if a witness from the Clark Hotel in Los Angeles were called that he would testify from his records that on or about January 29, 1939, Mr. Morgan affixed his signature to the register of the Hotel Clark in Los Angeles.

We will also stipulate that that same witness, if he were called, would testify that on or about February 21, 1939, Mr. Morgan affixed his signature to the register of the Hotel Clark in Los Angeles. (Tr. 1043-1044)

* * * * *

The Court: Do you rest?

Mr. Manster: We rest subject to making a motion to dismiss several counts in this indictment which have not been established. (Tr. 1045)

* * * * *

Mr. Manster: All right. The Government moves the dismissal of Count Three of the indictment, which is predicated upon a mailing to the witness Ida M. Apperson.

The Government moves the dismissal of the Sixth Count of the indictment predicated upon a mailing to the witness Henry K. Elder.

The Government moves the dismissal of the Seventh Count predicated upon a mailing to Ila Mae Hutchason.

The Government moves the dismissal of the Eighth Count [172-A] predicated upon a mailing to R. W. Peet.

The Government rests. (Tr. 1045-1046) [172-B]

Mr. Blue: May it please the Court, at this time on behalf of all the defendants—and what I say will be supplemented also by Mr. Cannon—I wish to move for a directed verdict and for a dismissal of each and every defendant on the grounds that the evidence as adduced by the Government is not sufficient under the indictment to present any question to the jury. (Tr. 1049)

* * * * *

At the conclusion of Mr. Cannon's statements, by reason of the fact that I have covered generally the motions for all the defendants, without specifically referring to any, I would like another opportunity to address the bench for a few moments on behalf of the other defendants.

Mr. Cannon: If the Court please, at this time I want to make some special motions to strike, if I may have the Clerk's list of exhibits?

First, I want to move to strike on behalf of all defendants, to strike from the record Exhibit 41 in evidence, copies of a log of an oil or gas well, Division of Oil and Gas, on the ground that no proper or any foundation has been laid for the introduction in evidence of that document; on the further ground that on its face alone it shows to be incompetent, and on the further ground that it is a narrative of past events.

They are copies, not the originals. No witness was produced to identify them except the fact that they got them from Plymouth Oil Office. They are dated September 26, 1939, purporting to set up what occurred on December 14, 1938. (Tr. 1069)

They are not signed by any witnesses produced. One of them bears no signature, typewritten or otherwise, and

the other one, attached to the sheet, is dated June 20, 1939, [173] purporting to reflect what occurred on February 28, 1939. (Tr. 1070)

Do you want to rule on them separately, or shall I make them all at one time? May I pass this to the bench? It is hearsay as to all the defendants.

The Court: There is one that bears the signature of Mr. Lacy.

Mr. Cannon: But the signature has never been identified. The witness was never produced. No person was offered as a witness to testify as to the regularity of the keeping of the document or the circumstance under which it was prepared, or where the original was filed.

I insist on all of them, but the primary objection is that it purports to be a narrative of past events.

The Court: I will deny your motion.

Mr. Cannon: Exception. I move at this time to strike Exhibit No. 27, which is a check No. 191, dated January 7, 1939, given to John McEvoy for \$100, signed by Mathilda M. Klinger, and also Exhibit No. 28, a check of March 1, 1939, given to Mr. McEvoy for \$20, signed by Mathilda Klinger, and Exhibit 29, certain stock certificates of Union Associated Mines Company, being stock certificates delivered to Mathilda M. Klinger on the ground that each and all of those exhibits are hearsay as to these defendants, and to all of them, there being no connection shown with those checks, receipt of the money for the stock, or delivery of the stock by any of the defendants to that witness. (Tr. 1071)

The Court: Your motion will be denied.

Mr. Cannon: Exception. [174]

Mr. Cannon: I move to strike Exhibit No. 50 which is a check of Fred L. Hunter for \$147.50 to R. L. Colburn, it being hearsay as to all the defendants and incompetent, irrelevant, and immaterial, and no proper foundation laid for it.

I can relate the circumstances, if your Honor is not familiar with them.

The Court: I don't recall that. (Tr. 1072)

Mr. Cannon: That is the transaction where Mr. Tucker said he had the transaction with Colburn & Company, and that Murphy suggested to him that he place an order through some brokerage, and when he asked him if he had any preference and Tucker said that he had not, the order was placed with Colburn & Company. He made the check payable to Colburn. Murphy is not even an alleged co-conspirator. It would clearly be hearsay as to all these defendants.

The Court: Do you remember where that testimony was?

Mr. Cannon: I can't give you the page, but I can give you the day he testified on it. [175]

Mr. Manster: I have it right here, Judge. The specific testimony with respect to this check is at page 881.

The Court: I will read it.

Mr. Manster: However, the testimony is that it was at Murphy's suggestion that the order for 5,000 shares, for which this check was given, was placed by Murphy with Colburn, and I think Mr. Cannon stated correctly that Mr. Tucker had no preference for any dealer through whom this transaction should be effected, and he permitted Murphy to select the dealer, and of course, Murphy was connected in this case with Collins in this particular trans-

action, and with this investor witness through the defendant Collins.

Mr. Cannon: There is no evidence of that. It was not proven. (Tr. 1073)

The Court: There isn't any evidence of this portion of the stock delivered by Associated to Plymouth, was there, on the open market?

Mr. Manster: No, but the pertinent evidence is this. Page 876 of the transcript:

"A. Well, Mr. Murphy said there was some stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid $2\frac{1}{2}$ or $2\frac{3}{4}$, and he asked me if I had any objection to what brokerage firm he put the order in through, and I told him I did not. So, when it was confirmed that—when the sale was confirmed, I gave him the check to deliver to the brokerage firm and he picked up the stock."

The sale was effected at the suggestion of Murphy through the brokerage firm which Murphy selected. (Tr. 1074) [176]

The Court: Well, I will deny that motion temporarily, but I will look into it.

Mr. Cannon: Exception. May it be deemed that I have made the same motion to strike Exhibit 52 upon the same grounds, it being the R. L. Colburn purchase order.

The Court: That is a part of that same transaction?

Mr. Cannon: Yes.

The Court: The motion will be denied.

Mr. Cannon: Exception.

Mr. Cannon: I move to strike the testimony, all the testimony of the witnesses Klinger and Walker on the ground that there is, so far as defendants Collins and Morgan are concerned, and Mr. Fischgrund and Mr. Schirm on the ground that the testimony is altogether hearsay as to them, it not appearing they had any connection with the transaction at all and were not present at conversations (Tr. 1075) had or representations made at any of these conversations, and if that motion may be deemed to be made without referring to the book and the page of the transcript, because I don't have the transcript, and I can't do it.

The Court: That motion will be denied.

Mr. Cannon: Exception. I move to strike the testimony, all the testimony of the witness Tucker on the ground that it is hearsay as to all of the defendants and no proper or any foundation was made for the introduction in evidence of that testimony, and it is immaterial so far as this case is concerned as it affects the defendants.

I call particular attention to the fact that Mr. Tucker testified specifically that he met Collins after he bought all his stock, and therefore it could have no probative value in the establishing of the scheme or the continuance thereof.

The Court: That motion will be denied.

Mr. Cannon: Exception. I will move on behalf of all defendants to strike the testimony of the witness Shomate on the ground that so far as all defendants are concerned, that it embraces the transaction, has to do with the transaction which is in no way mentioned in the indictment. There is no charge in this indictment to the effect that

we would assume to convey property to which there was no title, to any of the persons. (Tr. 1076)

I assume the only purpose of the testimony of Mr. Shomate was interrogation of the witness by the prosecution, indicating that he was directed toward establishing the lack of record titles in Gordon at the time he made the Millener lease, and that not having been charged against the defendants . . . in the indictment whatever, it becomes immaterial and irrelevant. It has no bearing on the issues in this case and is highly prejudicial.

I make that motion on behalf of all defendants for that reason, and I make it further on behalf of all de- [178] fendants except Gordon, on the ground that the transaction is entirely hearsay, and as to the rest of the defendants, it is also highly prejudicial.

In view of the fact that I don't want this Court or the Appellate Court to feel that I haven't called to the Court's attention the details of the transaction, if your Honor wants me to refresh your recollection as to the testimony, I will be glad to do that.

The Court: It was the testimony of the County Recorder, wasn't it?

Mr. Cannon: Yes, the County Recorder. He testified on the afternoon of July 13.

The Court: I will reserve my ruling on that. (Tr. 1077)

* * * * *

Mr. Cannon: * * *

I think the Court at this stage of the proceedings must go further than to determine whether or not there is even the slightest bit of evidence to go to the jury. I think

your Honor must come to the conclusion that there is substantial evidence before you should allow the case to go [179] to the jury, and if there is any hypothesis consistent with innocence which can be adopted in this case, your Honor at this stage of the proceedings, should direct a verdict.

I make the motion on behalf of all of the defendants, but I want particularly to call your attention to Morgan's and Collins' connection with the enterprise because those are the men in whose defense I am particularly interested. (Tr. 1079)

* * * * *

In this case I contend, as Mr. Blue has, that you ought not to require these defendants to go to a jury on a proposition where there is no substantial evidence to sustain the charge in the indictment. These men may have been guilty, I think they were not, but I say they may have been guilty of some other or different scheme to defraud than that alleged, but that would not justify your Honor to allow the jury to speculate on flimsy evidence of the type and character we have here. (Tr. 1084)

* * * * *

Mr. Blue: * * * I would at this time ask one more motion to strike, and that is the Exhibits that were offered and received in evidence through Mr. Shumate's testimony; that is a deed and a quit claim deed, a sheriff's deed and a quit claim deed.

The Court: I have reserved my ruling on that. (Tr. 1095)

* * * * *

Mr. Manster: * * * While on the subject of the Millener lease, both Mr. Cannon and Mr. Blue commented upon the irrelevance or immateriality of the fact that the defendant Gordon was not the record owner of the property which he purported to [180] convey to this Millener as a nominee, who subsequently conveyed it, within a week, to Union in exchange for this 235,000 share block of Union stock.

Well, with regard to the question of surprise, I cannot see that the defendants are prejudiced by the disclosure of this evidence inasmuch as these facts are peculiarly within the knowledge of Mr. Gordon.

The Court: That may apply in a civil case but I don't know about a criminal.

Mr. Manster: At least he is presumed to have knowledge of whether or not he is the record owner of property he—

The Court: I know.

Mr. Manster: —purports to convey.

The Court: But ordinarily you cannot go beyond the allegations of your indictment. That is what these gentlemen objected to.

Mr. Manster: Well, may I attempt to show—

The Court: The closest you came to that in your indictment was where you say that they acquired unproven land. You don't say anything about any fictitious title.

Mr. Manster: In connection with that allegation of the indictment, the effect upon the assets of the Union (Tr. 1116) Company is about the same if unproven or undeveloped land is conveyed in exchange for a large block of stock as if nothing was conveyed.

The Court: That may be true, but the question is whether you can go beyond the four corners of your pleading.

Mr. Manster: Well, I think it is extremely material on the question of scienter or intent on the part of Gordon. Intent, of course, is a vital factor to be established in every case, and I certainly believe that in a case of this type where the activities of these defendants have progressed [181] over a period of quite a few months that a purported conveyance in exchange for a consideration where there actually was no record ownership is material on that issue of intent. (Tr. 1117)

* * * * *

Mr. Blue: I say to the Court that in the exercise of your discretion, on the authorities that have been cited to you by Mr. Cannon and will be further cited to you by Mr. Cannon, that each and every one of these men should be acquitted by your direction, not by a jury. (Tr. 1146)

* * * * *

Mr. Cannon: So, I submit that the case ought not to go to the Jury. It is a case wherein the merits of things that have gone in here, a Jury can very well go awry on it and with all the matter the way it stands here now, there is no evidence on which this case could go to the Jury as to any one of the defendants.

* * * * *

The Court: * * * The record may show that the motion is submitted. (Tr. 1160) [182]

The Court: The motions submitted to the Court yesterday are denied. That includes the motion to strike the testimony by Mr. Shomate.

Mr. Cannon: May we have an exception to them? Also I understand, just so the record will be clear, that the motions were also directed to the dismissal of each and every count separately, and to the indictment as a whole?

The Court: Yes, that would be included. (Tr. 1163)

JAMES M. EVANS,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is James M. Evans, and I am an attorney with the Securities and Exchange Commission, and have been so employed since August, 1938; and have been on this case since the late fall of 1940. I was transferred to Los Angeles as a senior attorney in January of 1941, and since that time I have more or less handled the case because I was more familiar with it than anyone in this office. The statement in Defendants' Exhibit G in evidence, being a statement made by Mr. Duvoisin, accountant and investigator, to Mr. Charles R. Burr, Assistant Chief Accountant Investigator, dated October 19, 1939, identified through Lewis J. Hampton, is familiar to me, and calling my attention to the statement on the top of page 3 of that statement,

"McEvoy told me that the first well had been brought in on production and was producing 200 barrels of oil per day * * *"

The figures "200" in typing are ringed, and the words and figures as follows in pencil are inserted, "350 is correct." [183] That is in my handwriting and I put it

(Testimony of James M. Evans)

on several months ago, possibly last December. Mr. Hampton was in the office of the Securities and Exchange Commission on the 17th floor of this building and his statement was being reviewed by Mr. Manster and myself with him. I do not recall that he saw it. We were asking him questions about it and went over his statement. In the course of that discussion Mr. Hampton stated that 350 barrels of oil was correct, so thereupon I put a ring around the figure "200 barrels" and made the notation, "350 is correct." Hampton was in the room but I do not know whether he saw it or not. I do not recall (Tr. 1169). I do not believe the indictment was discussed with Mr. Hampton at that time, and I do not recall whether I asked him whether the statement was made that it was 350 barrels, or whether he volunteered the information (Tr. 1170).

Q. Calling your attention to the testimony of this witness Hampton, Page 830, on Line 9:

"Q. By Mr. Cannon: Calling your attention to this Exhibit G in evidence, the third page, the first sentence: 'During the course of the conversations McEvoy told him that the first well had been brought in on production and was producing 200 barrels of oil per day.'

"Did McEvoy tell you that?

"A. Yes, he said it was good for 350 barrels, that it was producing 350 barrels.

"Q. Said it was producing 350 barrels?

"A. Yes.

(Testimony of James M. Evans)

“Q. Now, then, whose handwriting is this where that pencilling is around the edge, ‘350 barrels is correct’? [184]

“A. I don’t know. I don’t know a thing about it, sir.”

Does that refresh your recollection as to whether you told him about it?

A. It doesn’t refresh my recollection. The situation is as I described it. (Tr. 1172)

(Witness continuing)

I met Mr. Murphy probably three years ago. He is the man who has been mentioned in this case as owning one-half of the Collins contract. I talked with him about the case, and we subpoenaed him as a witness, but he is not here, but he is in New York City. I am informed that he is employed by the Treasury Department and was at that time engaged in the Fifth War Loan Drive and he was excused from attendance here as a witness after a conversation with Mr. Carr, the United States Attorney. I cannot say that I knew that he had a participation in the Collins contract. I do not recall that he told me that he had such a participation. Mr. Brown, the man who is named in the indictment as being one of the persons to be defrauded, was in Los Angeles at the time this trial commenced, and remained here for several days. I talked with him very briefly, and excused him and told him we did not need him in this case.

(Testimony of James M. Evans)

Direct Examination

By Mr. Blue:

Dr. Hutchinson was also subpoenaed to appear in this case and presented himself here as a witness several days ago, but we did not call him as a witness.

Cross-Examination

By Mr. Manster: [185]

When Mr. Brown arrived here pursuant to a subpoena, it was the first occasion that I interviewed him, or had ever met him.

Redirect Examination

By Mr. Cannon:

But I examined the statement made by him to a representative of the S. E. C. before I had him subpoenaed here as a witness... (Tr. 1175)

(Witness excused.)

ROY P. DOLLEY,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

My name is Roy P. Dolley, I am an attorney, and I maintain my office in Los Angeles, and have been an attorney for 19 years, during the whole of which time Mr. Gordon has been a client of mine, and still is a client. I had something to do with Section 2, Township 25 South, Range 18 East, M. D. B. & M. in 1938 (Tr. 1177). In 1935 the Traders' Oil Company took a judgment against Mr. Gordon for a sum of \$3,757.00. Thereafter, Gor-

(Testimony of Roy P. Dolley)

don made a settlement of that judgment and paid it off, and the question arose as to the best way to redeem the title to it in view of the fact that it had been previously sold under an execution sale by the Sheriff of Kern County. I arranged to acquire for Mr. Gordon in the name of my secretary, Margaret E. Blynn, a Sheriff's deed conveying the property to her after the redemption had been effected. M. E. Blynn was my secretary in 1938 and is still my secretary, and when the property was transferred to her by Sheriff's deed, it was done at my direction and suggestion, upon the instructions of Mr. Gordon for whom I was acting. In this transaction M. E. Blynn was not acting [186] for herself, but was acting for Mr. Gordon and was trustee for him as a matter of convenience. Miss Blynn has never paid taxes on the property. Plaintiff's Exhibit 35 in evidence, being a "Quitclaim Deed," from M. E. Blynn to Mary L. Gordon, a married woman, was prepared by me, and I directed her to sign that deed, and the purpose was to convey the property back to Mr. Gordon. I, as an attorney, would say that in December of 1938, Mr. Gordon was one of the owners of that property; there isn't any doubt about it. I know Mr. Gordon's reputation in the County of Los Angeles for truth, honesty, and integrity is very good.

Cross-Examination

By Mr. Manster:

I have been doing Mr. Gordon's legal work for a period of more than 12 years without compensation, in view of the fact that we did represent him in previous times when

(Testimony of Roy P. Dolley)

he did, many years ago, pay us very substantial fees (Tr. 1182). Mr. Lacy is Mr. Gordon's nephew, and is a very prominent man in this community, and among other things is the head of various industrial enterprises and also a director of the Farmers and Merchants Bank in Los Angeles. I have done work for Mr. Lacy, but I do not consider him a remunerative client. On November 13, 1935, the Traders' Oil Corporation recovered a judgment against Fred V. Gordon, and on January 13, 1937, there was an execution issued against this property in Kern County, and Mr. Gordon's interest in this property was sold pursuant to the Sheriff's sale, in 1937. The property was acquired by M. E. Blynn as the record owner, on May 4, 1938, to effect a redemption from the Sheriff after Mr. Gordon had paid off the judgment to Traders' Oil Company (Tr. 1184). Mr. Gordon was the owner of the property, whether it was recorded or not. It would make no difference. On April 1, 1938, [187] there was executed by Traders' Oil Company an assignment to M. E. Blynn of all the rights, title and interest of that company in the property. I have some documents to show that between December, 1938 and December, 1939, Gordon had an interest in this property. He was the owner all during that time. The Sheriff levied an execution sale on this property, and in such an instance, involving real property in California, the owner of that property has still a right in it. The right to redeem it by paying

(Testimony of Roy P. Dolley)

the judgment. Mr. Gordon did pay the judgment, and did make the redemption, and now the only problem involved there is that he did so through my secretary rather than to do it himself. There was a reason for that. The correspondence here shows the payment of the money by Mr. Gordon, and in behalf of Mr. Gordon after the money was paid to redeem and after the Traders' Oil Company had assigned to M. E. Blynn the Sheriff's certificate of sale, we then sent the balance of the documents up to the sheriff, and the sheriff issued this certificate, or this sheriff's deed to M. E. Blynn on May 4, 1938. During all the time, Mr. Gordon was the owner of that property, by virtue of the right of redemption, and also by reason of the fact that he did redeem it sometime prior to May 4, 1938, and received the sheriff's deed on that date.

Redirect Examination

By Mr. Blue:

I have known Mr. Gordon for 20 years, and there was a time when he paid my law firm rather handsome fees. He hasn't been able to do so for the last few years, so, as a result, I haven't been paid. He was interested in various oil companies that we represented, that were doing considerable drilling and development in California. At that time [188] he was plenty times over a millionaire.

(Witness excused.)

RALPH ARNOLD,

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Ralph Arnold, and I am a geologist and have been such for about 45 years, and studied geology in Stanford University and received my degree in geology there, and have practiced geology ever since, mostly in California. I have represented the United States Government as geologist on work three different times, as follows: from 1903 to 1909 as a geologist on the United States Geological Survey; later, I helped organize the United States Bureau of Mines, the Petroleum Division; and during the last war I was on the Income and Excise Profits Tax Board, in charge of the Oil, Gas Mining and Lumber Division (Tr. 1190), for the United States Government, Bureau of Internal Revenue. I am the Ralph Arnold that mapped the field at Kettleman Hills in 1907 for the United States Government. In my profession as geologist I have geologized prior to production certain oil fields in California and which subsequently were drilled on my recommendation and became oil fields. It is difficult to say how many because some of the fields are divided into small units and the areas that we would recommend would include a considerable number of these smaller fields that have been brought in. Kettleman Hills would be one illustration as one of the fields that we outlined geologically with possibilities, and the land was so classified and the classification was accepted by the Government, and all this work was done before there was any

(Testimony of Ralph Arnold)

production in the Kettleman Hills, [189] and that same line of work was carried on from Coalinga south to Midway and to the Sunset Field. We classified all that land for the Land Office and the withdrawals were based on our geological work and on our classification. (Tr. 1192) They were withdrawn from agricultural entries in order to protect the oil men in their right to get their title through drilling rather than through homesteads. While I worked for the Government I had an occasion to make a geological survey of what is generally known today as the Devil's Den area, and made a geological survey of Section 2, Township 25, south range 18 East, spending about two weeks in the area. I have with me the map showing my geological conclusions reached while I was employed by the United States Geological Survey, and having to do with Section 2. This map was printed in 1908 or 1909 and has been in constant use ever since.

(At this point the document referred to was marked for identification as Defendant's Exhibit H.)

(Witness continuing)

Section 2, Township 1, 25 range 18 is shown on this map, and lies within the boundaries of the land that we had classified as possible oil territory at the time we made this examination. At the time we made this map there were no wells drilled in the United States, I guess, over 5,000 feet deep. So, we had to limit our guess on the area to the depth of 5,000 feet. When I classified this territory from the standpoint of geological possibilities, it was my opinion that this particular property did have possibilities of producing oil, based on the formation and

(Testimony of Ralph Arnold)

dips and general geological information that we could glean from the surface (Tr. 1196). Nothing materially has happened since that time to cause me to change my mind as to the possibilities of oil production in that particular section. I am familiar with the [190] development of the Lube Oil Company well on Section 2. I was shown the log of that particular well, and I wrote a preliminary report on it based on the work that had been done after I had made this examination. (Tr. 1197)

(A document was marked Defendants' Exhibit I, for identification.)

(Witness continuing)

The memorandum included in that Exhibit I was actually written or dictated by me, and to the best of my belief is true.

(The document heretofore marked Defendants' Exhibit I, was received in evidence, and Mr. Blue read the following portions thereof to the jury:)

“MEMORANDUM RE SOUTH DEVIL'S DEN
“FAULT STRUCTURE, KERN COUNTY,
CALIFORNIA

“BY RALPH ARNOLD

“This memorandum supplements and accompanies the report on this territory by Rollo Ellis under date of April 29, 1936. The writer has read this report and concurs in the general conclusions contained therein. The reader is referred to Mr. Ellis' report for all details regarding the region.

(Testimony of Ralph Arnold)

"When Harry R. Johnson and the writer mapped this region in 1908, no one realized the important part that faults and overlaps play in the accumulation of petroleum and gas in California. Although we recognized the oil possibilities of the territory under discussion and classified it as oil land, nevertheless we failed to note the very important economic significance of what writer calls the Cross Fault which causes and passes through Dagany Gap in a northeast-southwest direction and which is [191] shown on the map.

"The rocks on the northwest side of this fault have been moved toward the northeast, with a resultant reflection in the topography and the formation of the Alamo Solo Spring, which rises from the fault. There seems to have been little or no vertical displacement along this fault except possible east of the gap. The oil and salt spring in Section 25-28-18 is a point on the other important feature of this structure, the Faulted Anticline. (See photographs 6 and 7).

"The triangular block bounded by the Faulted Anticline on the southwest, the Cross Fault on the northwest and the township line (roughly) on the east, offers good opportunities for the development of commercial quantities of oil and gas. The beds in this block dip toward the northeast and plunge toward the southeast. The two faults act as closures on their respective sides of the block. There is a fine gathering ground toward the southeast in the structural 'low' between the south end of the Kettle-

(Testimony of Ralph Arnold)

man Hills structure and the Lost Hills elongated dome. The presence of oil in commercial quantities in the block is proven by the Standard and Richfield wells in Section 14-25-18, and the southward extension of the field is suggested by the oil spring and commercial wells in Section 25-25-18. The wells should vary in depth from about 1000 feet in the shallower locations to 7000 feet or more on the eastern limit of production. The gravity of the oil should range between 19' and 45', the lighter oil coming from the deeper sands. [192]

"In view of the favorable conditions prevailing in the area, the writer recommends the development of the block, beginning on the west side and extending operations by steps toward the south and east.

"(signed) Ralph Arnold

"San Francisco, California

"April 29, 1936." (Tr. 1200-1202)

(Witness continuing)

My opinion regarding that particular section is still the same today as it was then. It is true that my structure map shows a very steep anticline coming down through the Pyramid Hills, the axis of it slightly to the westerly from this property, and plunging under the valley floor to the generally easterly direction, southeasterly direction. But I would not say that by reason of that particular dip, of that anticline, that to find oil there was improbable. By reason of that structure I would come to the conclusion that any place along the axis of that

(Testimony of Ralph Arnold)

anticline, would be worthy of drilling a well for development. At this moment, there is being erected a derrick within five miles of this section 2, southeast of it, by two of the best companies in the State, to test an area which is not unlike this area in section 2. They intend to go 10,000 feet before they get through. Those companies are the C.C.M.O., which is the oil company of the Santa Fe Railroad, and the California Company, which represents the Bank of America. I submitted my opinion from a geological standpoint to these two companies and their drilling is based upon my recommendation. While conditions are somewhat different, it is along the same general trend and strike of the formations. I have known Fred Gordon about 40 years, and [193] know that he has been in the oil business even before I was. I know his reputation in this County for truth, honesty and integrity is good. I think I have known Mr. Schirm for probably 5 or 6 years, and he and I worked on certain deals. I know his reputation in the County of Los Angeles for truth, honesty and integrity, and it is good.

Direct Examination

By Mr. Cannon:

I believe I have known Mr. Morgan for 6 or 8 years, and know his general reputation for truth, honesty and fair dealing in the community in which he resides in Salt Lake City and thereabouts. His reputation is good.

(Testimony of Ralph Arnold)

Cross-Examination

By Mr. Manster:

I mapped or geologized this Section 2 in the Devil's Den area some time between 1903 and 1909. The map in Defendants' Exhibit H is dated 1909, but the work was done in 1907 or 1908. (Tr. 1207) I have made no investigation or recent studies of Section 2 with reference to its possibilities for producing oil, since the report that I made in Defendants' Exhibit I, in 1936. I did not supervise the drilling of the Lube Oil Company well in 1936 or 1937, but I examined certain cores that were extracted from the well and I have seen the electric log. I do not know whether that well ever produced any oil. I do not know that operations on the well were suspended in 1937. I do not know the exact depth to which it was drilled. Section 2 in this Devil's Den area of Kern County shows possibilities for the production of oil.

Reading from Bulletin No. 118, of the California [194] Department of Natural Resources, Division of Mines, where it says:

"The oil of the Devil's Den district has accumulated in beds of the Oligocene Wagonwheel formation. In the main field these formations dip homoclinally, but oil is also produced from the Alferitz anticline. The productivity of the wells is so small as to be of minor importance."

Q. Now, would you agree with the statement, the last sentence, that "the productivity of the wells is so small as to be of minor importance"?

A. No, sir.

(Tr. 1211-1212)

(Testimony of Ralph Arnold)

(Witness continuing)

I know the authors of this article very well but disagree with the conclusions drawn by them, although I have read the entire article. I could not answer as to whether or not any oil has been produced from Section 2 in Kern County, nor do I know if any wells other than Lube Oil Company Well No. 1 has ever been drilled in that section.

(Witness excused.) (Tr. 1212)

Re-Direct Examination

By Mr. Blue:

The fact that a dry hole is drilled in a section in the Devil's Den area would not condemn the entire section. There were 21 wells drilled in the Kettleman Hills before they brought in a productive well.

Recross-Examination

By Mr. Manster:

Those 21 wells were drilled in an area 2 or 3 miles wide and 5 or 6 miles long. I think I approved the [195] recommendation for the drilling of the Lube Oil Company well in Section 2. I do not know that it was successful for the production of oil. The drilling of a dry hole within three-quarters of a mile of a certain tract would not necessarily be any indication that the tract in question would not produce oil in commercial quantities. You can drill a well within a hundred feet of a place where there is a fault involved and it doesn't tell you anything about the conditions on the other side of the fault.

(Witness excused.) (Tr. 1215)

JOHN H. WENTS, JR.

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is John H. Wents, and I am a Consulting Petroleum Geologist and Engineer, and have been consulting for about six years. Prior to that I was practicing the profession of geologist and engineer in Los Angeles and have had college training in petroleum engineering and petroleum geology. I attended Stanford University 4 years, and U. S. C. for 5 years. In my profession I examine oil properties on behalf of clients for the purpose of determining values. I am engineering geologist for Dominguez Estate Company, Carson Estate Company, Harold C. Morton & Associates, Lebow & McNee, George Nordenholdt, who was formerly director of Natural Resources, J. Paul Getty, and I have been employed from time to time by the Division of Lands, Department of Justice, and by the County of Los Angeles. In 1938 I was in the business of appraising properties from the standpoint of oil values, and familiar with and did appraise properties in the westerly and [196] north-westerly portions of the city of Torrance, in Los Angeles County, and evaluated royalties for the purpose of purchase or sale in Torrance. I did this in 1938 as an independent consulting engineer. An overriding royalty bears no part in the operation expense on a well unless in the assignment it is so worded that it does, while a participating royalty is a type of a working interest and bears some proportionate part of the expense of operating or producing the oil. That is the main difference between

(Testimony of John H. Wents, Jr.)

the two. In 1938, particularly in the month of September, I was familiar with the values of property in the Torrance Field located in the immediate vicinity of 237th Street between Narbonne and Eshelman. (Tr. 1219) We called that a sector of the Torrance Field. From my experience, I would say that a one per cent overriding interest with nothing deducted for the cost of operation, on a one acre piece located between 236th and 237th Street, between Narbonne and Eshelman Avenue was worth in the neighborhood of \$1200.00, if the well was a contemplated well, or a well which was drilling. If the well was on production the value of the royalty would depend on the production. That \$1200.00 is for each one per cent (Tr. 1220-21), and a 50 per cent interest would be worth \$60,000.00. If that well was drilled in November, and was contracted out by responsible persons, while the well was drilling, those per cents would be worth 1200 a per cent; the value would not change until the well was completed. If the well was completed on that property, and the original production was 124 barrels per day, 27 gravity oil, and at the end of that month of December, 1938, production was approximately 100 barrels a day. I would say that the reasonable market value of a one per cent overriding interest in that well would be in the neighborhood of \$1400.00 a per cent, or \$70,000.00 for 50 per cent. (Tr. 1222) [197]

I am generally familiar with the initial production of wells in that particular area in 1938 and 1939. There were about 55 or 60 wells. I think, drilled in the immediate vicinity of 237th and Eshelman, and if a person had a lease on that particular block of an acre of land, that person would be entitled to believe that if he drilled

(Testimony of John H. Wents, Jr.)

that well to the second Del Amo sand, that he would get a productive well. A participating royalty in an oil well in that same block, in January, 1939, was worth approximately two-thirds of the amount the overriding royalty was worth. That is to say, it would be worth about \$800.00 a per cent. The value after the well came in was greater than it was while the well was drilling. I have known Mr. Gordon quite well for the last 10 or 12 years, and know his reputation in this county for truth, honesty, and fair dealing, and I think it is of the highest. (Tr. 1225)

Cross-Examination

By Mr. Manster:

A well in this block that we have described, producing 100 barrels a day around the end of December, 1938, would sell at the rate of \$1400.00 for a one per cent overriding royalty. If the production is higher, the selling price would be higher. It is a foregone conclusion that production will decline, and if production declines the value of the royalty itself becomes less. The worth of a royalty interest would be entirely dependent, in a producing well, on the high and low production of a particular month. On the high production of 120 barrels a day, just taking the production capability rate, the value of the royalty would be \$1400.00. If the production was 70 barrels, and that had been the high production, then the value of that royalty would be [198] approximately \$1,050.00. The thickness of the producing oil zone in that area in the Torrance Field was approximately 70 or 80 feet. The drainage is not limited by the area or the surface acreage upon which the well is located. However, the per acreage recovery per acre-foot there

(Testimony of John H. Wents, Jr.)

was better than 550 barrels, I believe. (Tr. 1232) I never watched those particular wells, Plymouth's Wells 1 and 2, during the time that they were drilling, but I know of their locations with respect to the acreage, but I do not know the general particulars regarding their completions, shutoff points or perforations, or anything (Tr. 1235), nor their production rates. My estimate of a value of \$1400.00 for one per cent interest was based on general averages on surrounding wells in that particular area.

Re-Direct Examination

By Mr. Blue:

(At this time, the Electrolog of Plymouth Well No. 1 was offered and received in evidence.)

(Witness excused.)

ROLLO ELLIS,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Rollo Ellis and I am a Petroleum Geologist and Operator, and in 1936 was President of the Lube Oil Company, which had a lease on 200 acres from Fred Gordon. Lube Oil Company is a Corporation and has an office in the Financial Center Building in San Francisco. The lease called for a royalty of one-sixth to the landowner, and after getting [199] the lease in Section 2-25-18, I proceeded to drill a well on that Section. Prior thereto I had checked over the Section from the standpoint of geological possibilities for producing oil, and

Testimony of Rollo Ellis)

spent about two weeks on the property making a check. I also got information from the Associated Oil Company and from Dr. Ralph Arnold, to make up the final picture before we spudded in on Thanksgiving Day, in 1936, and drilled on that well until sometime in April, 1937, spending about \$70,000.00 in going to a depth of 4,280 feet. (Tr. 1242) While drilling down in the hole we had a lot of oil indications, and passed through the Temblor zone, which is a productive zone of the Kettleman Hills. We actually shut down the well because we ran out of money, and suspended operations in 1937. I am still trying to make arrangements to refinance the operation so as to go ahead. The well has only been abandoned within about the last two weeks, but it was not abandoned as a dry hole, but so as to release the bond placed against the well for properly abandoning it. In December, 1938, we had not abandoned that well, and at that time we thought most certainly we would be able to go ahead with it. I have here the Schlumberger Electric log and the driller's log of that well (Tr. 1246), showing the formations through which we passed. From time to time we took cores in this well. It was hard drilling. This Schlumberger is correct as of February 19, 1937.

(This document referred to is marked Defendants' Exhibit K, and received in evidence.)

(Witness continuing)

I have another map taken from my folder, a map called "Pyramid Hills and Devil's Den Area" indicating that the Standard Oil of California, General Petroleum, and Standard Oil of New York, had leases in that area. I had under lease [200] at that time about 1,000 acres, in

Testimony of Rollo Ellis)

addition to the Gordon land. I had some leases from the University of California and from Tres Tietes. (Tr. 1250)

(The document referred to was marked Defendants' Exhibit L, and received in evidence.)

(Witness continuing)

In the winter months of 1938-1939, Morgan came into my office in San Francisco, and I talked with him in reference to Section 2-25-18. He had a card from Gordon asking me to explain what I knew about that area to him. I did that, and probably gave him a couple of hours' time. Just previous to that I had gotten up this report that I am using now, and I gave him Defendants' Exhibit I in evidence; I explained to him the work that I had done in that particular area. This was in late December or in the early part of the year. Morgan asked me particularly as to my opinion of this 40 acres described in the north-east quarter of the northwest quarter, Section 2, Township 25, south range 18, and I told him I believed it was oil land. I first met Mr. Gordon back about 1930, but I did not become very well acquainted with him until several years after that. I knew his reputation in this community for truth, honesty and fair dealing, and it is very good.

Cross-Examination

By Mr. Manster:

The lease I took from Gordon in 1936 covered approximately 200 acres in Section 2, but it did not include the 40 acres in the upper northeast corner of the tract. I think I paid Gordon \$500.00 upon the signing of the lease, and then there was to be \$500.00 per month rental until

Testimony of Rollo Ellis)

the drilling or something of that sort began. I suspended drill- [201] ing on this Lube Oil Company well in April, 1937, and have never sold a barrel of oil out of that well. The well was never finished. After 1937, drilling operations have never been recommenced. Mr. Gordon never put any of his own money in that well. I do not know anything about Mr. Gordon's connection in these fields between Plymouth Oil Company and Union Associated Mines. My dealings with Mr. Gordon were solely in connection with the fact that he was lessor and I was lessee. (Tr. 1256)

(Witness excused.)

JOHN W. LUTER,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is John W. Luter, and I live adjacent to Beverly Hills, California. I am an attorney and have been such since about 1909. I am acquainted with James H. Collins and know his general reputation in the community where he resides for truth, honesty, veracity, and fair dealing, and it is good.

Cross-Examination

By Mr. Manster:

I am an attorney at law. Several years ago I served under the Municipal, and I also served as Pro Tem for several years as a judge in the Superior Court. I have known Collins generally for some three and one-half

(Testimony of John W. Luter)

years, and have had some business dealings with him and his wife, and I live, as I say, right in that vicinity. Insofar as I have heard in that general community, all the people that I know who have known him have spoken well of him, and my [202] dealings with him were satisfactory. I know nothing whatever about Mr. Collins' connection with the sale of stock of Union Associated Mines Company. (Tr. 1259)

(Witness excused.)

SIDNEY FISCHGRUND,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Sidney Fischgrund, and I am one of the defendants in the case. I am an attorney at law, and 37 years old. I was admitted to practice law in 1931, and have practiced in Los Angeles since three or four years after I was admitted. Prior to the time that I began to practice law, I was in the insurance and real estate business. I began to practice law about 1934, and at that time was 27 years old. When I first began to practice I was associated with Henry Hayes, and after that I took an office in the suite of Richard A. Dunnigan in the Foreman Building. That was about 1935, and I am still in that office. I was not actually associated with Mr. Dunnigan. However, frequently we would discuss our problems together, and I would call him in on a case that I perhaps could not handle, and he would ask me to handle cases of his that he could not handle, or when he

(Testimony of Sidney Fischgrund)

was busy. I paid my own rent, my own telephone bill, and my proportionate share of the stenographic expense. I was a free and independent agent acting as an independent lawyer. Up until August of 1938 I had not had any experience as a lawyer in oil matters, except that many years ago my mother and I purchased a lot in Wilmington and it was subsequently leased to an oil company that drilled a community well, and [203] after that well was drilled a royalty was paid every month. We are still getting a very small royalty from it. In the late summer of 1938, I signed the original Articles of Incorporation of Plymouth Oil Company and became its Vice-President. I was one of the original Directors, and Fred V. Gordon and Guy Davies were the other directors. Prior to the formation of that company, I had discussed its formation with Mr. Gordon and Mr. Davis. (Tr. 1263) It is pretty hard to say when I first met Mr. Gordon, but it was prior to the time that I signed as an incorporator of this company, and I met Mr. Davis before I had become a member of the company. After the company was organized, we commenced taking oil leases on various properties in Southern California; numerous leases were obtained on prospective oil fields. I participated in these activities. The office was constantly inhabited by oil hounds, or lease hounds, that is, persons who were interested in leasing or obtaining leases in the various fields. But prior to that time I had had no experience with lease hounds and met them when I became a Director of Plymouth Oil Company. The plan was to obtain oil leases in prospective oil fields, and if the fields were developed we could then obtain financing for the drilling of an oil well in the prospective field or sell the

(Testimony of Sidney Fischgrund)

lease on a basis whereby the Plymouth Oil Company would retain an interest in the well. I personally went out to the Carmenita Field, which was being drilled right near Norwalk, near Los Angeles, and together with Mr. Bray's assistance, we went out and leased up acres of ground there on property that was adjoining leases, of an oil well that had been drilled or was in the process of being drilled by John McKeon. (Tr. 1266) The well was down to about 7500 feet and Mr. McKeon came in the office and was very enthusiastic about the certainty of [204] the well being brought in in that Field, and I left the office for about two weeks and leased up any number of parcels of land and placed them in escrow. That was the program of the Plymouth Oil Company. At that time, the Torrance Field was considered the hot spot; the most active oil center in southern California. It is difficult to remember exactly who was in the office about this time, but Mr. Schirm would come in and say, "Now, look at this, this particular article, about what is being done in Torrance." Mr. McKeon would come in and would mention something about his well and about Torrance Field being the hot spot. Certain leases were submitted to the Board of Directors of Plymouth but I believe several of them were obtained in various areas around the place where they were drilling. The term "lease hound" is not used in any derogatory sense. They are respected in the industry. A "hot spot" was a place where there was an absolute certainty of bringing in the well, because the drilling operations around that particular area had proved successful, and every driller in the country was trying to drill in that particular area. I first heard of Union Associated Mines Company after

(Testimony of Sidney Fischgrund)

we had obtained these leases, about the latter part, or toward the middle part of 1938. (Tr. 1268) It would be impossible to remember the first conversation with anyone concerning Union Associated, but to the best of my memory I talked to Mr. Gordon and with Mr. Davis, and I am sure I talked it over with someone else. I think Mr. Morgan was down here at one time and I discussed it with Mr. Morgan and Mr. Dunnigan and Mr. Siens. I discussed the matter of the Plymouth Oil deal with Union Associated with Mr. Dunnigan, and relied upon what he told me. He was a member of the bar for 25 years and I think he was the first one who introduced me to Mr. [205] Siens and various other individuals who were in the oil business, and said Siens knew more about the oil business than possibly any other man, and could build a company because he knew how an oil company could be developed. He said Gordon was one man who had been to every oil field in the United States, and knew more about the oil fields, and he told me that Gordon at one time had unlimited credit as far as the Farmers and Merchants Bank was concerned; and had a letter of credit whereby he could spend as much as a half a million dollars on behalf of the Farmers & Merchants Bank. He told me that Guy Davis was formerly an auditor of the Richfield Oil Company and a man who knew all of the intricacies and the manner in which the books and records of an oil company should be kept. These are the sum and substance of the various conversations that I had with Dunnigan, Siens, Gordon, Davis and Morgan, as a means by which an oil company could be formed and financed. From that time until now I have been Vice-President of the Plymouth Oil Company, and a Director and attended

(Testimony of Sidney Fischgrund)

Directors' meetings. I never at any time knowingly did anything that was wrongful in my position, and I do not think there was anything wrongful about anything that was done as far as this transaction was concerned and as far as all the parties are concerned.

(At this point, the witness, Sidney Fischgrund, was temporarily withdrawn from the stand.)

JOHN R. PEMBERTON,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is John R .Pemberton and I am a Petroleum [206] Geologist and Engineer. I graduated from Stanford University in 1909. After my graduation I was an instructor in the University for a year and then I was engaged by the Argentine Government in land classification, and lived in that country for five years. I returned to this country and was in business in Los Angeles for two years, then in the Mid-Continent for several years, and returned to Los Angeles where I have been continually since about the middle of 1921. When I came to Los Angeles in 1921 I was employed by the Pan-American Petroleum Company, until the end of 1931, although the Pan-American Petroleum Company had been sold in 1923 or 1924 to Pacific Western Company and my employer was the Petroleum Securities Company, another of the Doheny interests or corporations. (Tr. 1273) During the year 1938, in addition to being a petroleum geologist and petroleum engineer, I was a so-called oil umpire for

(Testimony of John R. Pemberton)

the California Petroleum Producers, and I had held that office from 1932 until the middle of 1940. As such oil umpire, my duties involved the stabilization of the crude oil producing industry and a tabulation of all of the oil fields in the State of California, their locations, depths, ability to produce, gravities of oil, owners, the market demand for oil, and the allocation to the producers of crude oil of the consumptive market demand for oil for the purpose of not producing a surplus and causing unpleasant things to happen to the industry, and affecting labor and prices and insurance and taxes and everything. (Tr. 1274) I am generally familiar with the development of the deep sands at Torrance in 1938 and 1939, and familiar particularly with that portion of the extension of the Torrance Field being on 237th Street between Narbonne and Eshelman Streets. I cannot say that I know generally the number of wells that were drilled to the Del Amo sand in [207] the Torrance Field in 1938-39, but roughly, I imagine that there would be 50 wells but I might be quite wrong there. There were a considerable number of wells. (Tr. 1276) The Torrance Field was an oil field, however, prior to 1938. I would say, roughly, that it was brought in in 1922, and has produced continuously since 1922, and it is still producing. On the map that you show me I find a well marked "A-226" and in the year 1938 wells drilled at the location of that Well No. 226 would in my opinion be producing oil wells.

(The document referred to was marked Defendants' Exhibit M. and received in evidence.)

(Witness continuing)

I have known Fred V. Gordon I think about 20 years, and knew him when he was Vice-President of Cal Pet.

(Testimony of John R. Pemberton)

Mr. Gordon's reputation in this community for truth, honesty, and fair dealing, so far as I am concerned and know, is good. I know Christopher Schirm, and have known him about 20 years, and knew him when he was an employee of Pan American Company. Mr. Schirm's reputation in this community for truth, honesty, and fair dealing is very good.

Mr. Manster: No questions. (Tr. 1281)

(Witness excused.)

SIDNEY FISCHGRUND,

recalled as a witness by the Defendants, having been previously duly sworn, testified further as follows:

Direct Examination

(continued.)

By Mr. Blue:

I have not knowingly done anything wrong in any of my actions, and I still believe I have not done anything wrong. I myself purchased stock in Union Associated Mines [208] and I purchased the 1500 shares, as shown in the 15 certificates which you show me. I bought that stock in August or September, 1938.

(Documents referred to were received in evidence and marked Defendants' Exhibit N.)

The \$300.00 check drawn by me in favor of Plymouth Oil Company was given by me in payment of certain shares of Union Associated Mines stock; as was also a check for \$50.00 made payable to the Plymouth Oil Company, dated September 8, 1939; as was also the check dated December 13, 1938, made payable to Young, Clark

(Testimony of Sidney Fischgrund)

& Company in the amount of \$152.50. (Tr. 1282) The check for \$1.70, dated February 14, to Young Clark, in 1939, was given to them as a balance owing on the purchase of stock made on December 13, 1938. That small balance was probably for insurance or some charge made by that company through whom the stock was purchased. I paid 3 cents a share for the stock I bought from Young Clark. I also bought stock represented by 5 other certificates for 1,000 shares each, one thousand in my own name, one thousand in the name of my sister, Edna, one in the name of Manuel Klein, another in the name of Manuel Klein, all through Young Clark. The fifth certificate is missing, but I bought this stock on the day, I believe that the well came in. In my opinion, it was easy to compute that the stock should be worth more than 3 cents a share on the day when the well came in, and judging by the production of wells in the immediate vicinity, it would be easy to calculate at that price I paid that the stock would be worth more money, and I am sure it would have been if the wells had staid up at the production. In other words, I bought the stock because I felt that I was making a good buy on the market. [209]

(The stock certificates were received in evidence and marked Defendants' Exhibit O.)

(Witness continuing)

During all of this time, and up to the time I was indicted, I knew Mr. Gordon. He did not keep his office at the office of the Plymouth Oil Company, but in the Subway Terminal Building. Mr. Gordon very rarely and very infrequently came to the office of the Plymouth Oil Company. I knew Mr. Schirm. He never did any

(Testimony of Sidney Fischgrund)

work for the Plymouth Oil Company. He would come in and try to lease, and he might take the lease, and I think he would pick one in Lacy's name and then come in to the Plymouth Oil Company and discuss the matter of that lease with us and make an assignment or have Lacy make an assignment of that lease to the Plymouth Oil Company, but he never worked for that company. He worked as an individual, for himself. To my knowledge Mr. Schirm had nothing whatever to do with the Plymouth Oil Company or the Union Associated Mines deal after December of 1938. I never did receive any money from the Plymouth Oil Company, although possibly there may be a check or two for money I had expended for the Plymouth Oil Company. There may have been a wire I sent or some incidental expense, but so far as I am personally concerned, I never received any money for anything I have done. I never got back that \$300.00 or that \$50.00, and never did any legal work for Union Associated Mines, and never received any money for acting as Vice-President or for attending Directors' meetings. I am a stockholder of Plymouth Oil Company, and I never did receive a dime of money or anything outside of these stock certificates here from the Union Associated Mines Company. There is not anything that I can think of at the present time that causes me to believe that anything that I did in [210] 1938, to this present day, was dishonest. I personally appeared before the Securities and Exchange Commission in Los Angeles, and made a voluntary statement to the Commission in the presence of Mr. Evans, sitting at this table; and I offered to give him all of the exhibits and evidence that I had in my office, as evidence of my good faith, and of the

(Testimony of Sidney Fischgrund)

operations of the company, and I thought I had convinced him of that fact. That was in 1940, I believe. (Tr. 1288)

Cross-Examination

By Mr. Manster:

When I came before the Commission, I realized that the Commission had the power of subpoena, but I didn't have to answer if I didn't know. You know as an attorney, and you know that I could have advised all of the defendants not to answer if I had found anything wrong; and the Commission could not compel me to testify under oath if I felt that it would incriminate me. I am one of the three incorporators of the Plymouth Oil Company, which was incorporated in August, 1938, and the capitalization was one million shares of 10 cents par value stock. Only one thousand of the one million shares were issued, 400 of which were issued to me as Vice-President, 400 to Fred Gordon, and 200 to Guy B. Davis. We were vice-president, president and secretary-treasurer, respectively. No other stock has been issued since these original qualifying shares were issued. The Plymouth Company was really a closed corporation, organized as such, and continued as such, and one of its objects was to acquire leases for the purpose of drilling oil wells.

Q. It had some other purposes too, didn't it? For example, I refer to Paragraph D in the Articles of Incorporation.

A. May I interrupt you, Mr. Manster? [211]

Q. Pardon me. Let me form the question. Directing your attention to Paragraph D: "To buy, sell or mortgage, hypothecate and/or deal in the stock and bonds of other corporations."

(Testimony of Sidney Fischgrund)

* * * * *

Q. By Mr. Manster: It is one of the purposes of the Plymouth Oil Company to deal in the securities of other corporations, wasn't it?

A. If you read that statement, Mr. Manster, from the beginning, you will find that it permits the Plymouth Oil Company or any oil company to do almost anything they desire, but that doesn't show the purpose for which it was formed.

Q. It is a two-line paragraph just as I have read it, and I will ask you if it isn't a fact that one of the purposes of Plymouth Oil Company was to deal in the securities of other corporations?

A. If you commence with A and read all of it, it is to carry out the business of producing, acquiring, buying and selling.

Q. Would you please direct your answer to that question.

A. That is one of the things that it was to do and could do, and I think you could also find it was to buy real estate in there, but that isn't the purpose for which it was formed. (Tr. 1290-1291)

(Witness continuing)

I do not remember precisely, it was approximately a month after the incorporation of the Plymouth that the contract with the Union Associated Mines was made. I had done a considerable amount of legal work for the Plymouth Company and Mr. Dunnigan and I prepared the contracts between Plymouth and Union Associated Mines. I discussed it with Mr. Dunnigan and I [212]

(Testimony of Sidney Fischgrund)

think I dictated the document and signed it; in fact, signed both contracts as an officer of the company. I prepared the contract between James Collins and E. Byron Siens with reference to Mr. Collins' purchase of a million shares of stock, which had a progressively increasing price scale (Tr. 1292). Before preparing that contract, dated January 17, 1939, I prepared two previous contracts of a similar nature between Collins and the Plymouth Company. As an officer and director of Plymouth Oil Company, I chose to assume the responsibility of that office and I regarded myself as part of the Plymouth Oil Company because I had done a lot of work in connection with it. I had four-tenths of the stock, and I was interested in seeing that it was a success. Gordon and I were the two main figures of the Plymouth Oil by reason of our stock holdings. I know Mr. Adkisson who testified here as a witness. I had an office in the Plymouth office about August, 1938; rather, my office adjoined the office of Plymouth, but it was in an outside suite with a connecting door between it and all of the other offices. There were 100 individuals that came in the Plymouth offices, but Mr. Davis occupied one office that was immediately next to mine, and the office on the far side had a separate entrance to it, a separate entrance to the hall and was occupied by his secretary. Mr. Siens was in the office frequently. In fact, the Plymouth Oil Company succeeded to the office space formerly occupied by the Commercial Oil Company. Siens was not the leading figure in the Commercial Oil Company. He was not a member of that firm. Mr. Siens had a private office right across from Mr. Dunnigan's office. In effecting transactions for the Plymouth Company

(Testimony of Sidney Fischgrund)

such as these two contracts for the wells that were made between Union and Plymouth, and the Collins contract with Siens, I would consult Mr. Gordon about it and would get his opinion [213] and would get his approval. Gordon and I discussed together the activities of the company. In fact, Davis did most of the work in the office. He supervised the drilling of the wells and was out in the field day and night. He did most of the work, actually, as an employee of Plymouth Oil Company, and he received compensation from that company. I know Adkisson was in the office, the same as a lot of other brokers who were interested in the stock of Union Associated Mines Company. I believe I knew Morgan in September, 1938. I did not know that Plymouth Oil was interested in buying the control of the Union Associated Mines Company. There was no correspondence or anything that would lead anyone to believe that the Plymouth Oil Company was trying to control any company. I have listened to the reading of the correspondence which has been read here in court. I believe I knew that Siens went to Salt Lake, but what he did there, I do not know. I heard some discussion in the office that Siens and Adkisson went up to Salt Lake, but I do not believe I knew the purpose of the trip, although I believe there was some conversation to the effect that they were going to contact Morgan with reference to the Union Company. I did not hear that Morgan had an option on 200,000 shares of Union stock. I did not know that Siens had been to Salt Lake and had a meeting with the Union Associated Mines at which a contract between Plymouth and Union was discussed, until afterwards. I assisted in the preparation of that contract. There were numerous con-

(Testimony of Sidney Fischgrund)

versations about transactions as to how the stock of the company would be acquired as a means of furnishing finances for the drilling of the oil wells. I knew that Adkisson and Siens went to Salt Lake on some proposition, but I do not know what it was. I was busy in the office taking care of the work I [214] had, and I cannot keep track of every conversation that went on in the various offices. (Tr. 1299) I do not remember any conversations that were had with reference to the reason why Adkisson and Siens went to Salt Lake. It is difficult to remember how many times Adkisson was in the office; possibly 6, 8 or 10 times, or more. Neither Adkisson nor Siens consulted with me as to the legal questions pertaining to the Plymouth Oil Company, that I recall; but I do recall preparing the Plymouth-Union contract with reference to the first well. It is difficult to remember from what source I received the information upon which that agreement was drawn, but there were numerous conversations and as a result of those conversations that agreement was prepared. I had conversations with Adkisson, Siens, Davis, Gordon and possibly others in the office at that time, and that contract was the result of those conversations. (Tr. 1301) I did not know at that time what the value or market price of the Union Associated Mines stock was, in the early part of September, or middle of September. I did not know that Morgan had purchased those 200,000 shares for \$800.00. I had no reason to question the opinion of Morgan, Siens, or Gordon with reference to the deal between the Plymouth and the Union Company. I did not know that Mr. Adkisson subsequently went to Salt Lake to contact Morgan and Barclay. I think Adkisson had an office elsewhere. He

(Testimony of Sidney Fischgrund)

came to the Plymouth offices occasionally. I never did hear any conversations between Adkisson, Morgan, or anyone else in the office, with reference to raising the market on the stock. I did not hear such terms used as "cleaning up the market" nor terms such as "submitting progressively higher bids for the purpose of buying up the cheap stock." (Tr. 1303) The first well came in about December 13 or 14, 1938. I did [215] not know of the telegram nor did I see it, and I did not know that a telegram had been sent up to Salt Lake reporting that the well had opened at 226 barrels. I was definitely interested in what the well was doing, but I could not prevent others from sending telegrams. The value of the Union Associated Mines Company stock depended to a great extent upon the production of that well. (Tr. 1305) I did not know what the assets were of the Union Associated Company, before this contract between Plymouth and Union was made in September. but I knew the company was a dormant one. The fact that it had lost its charter is of no consequence. I knew it had mining claims in Utah that had a fine background; I knew that the Company had not paid any dividends; I did not know that about two-thirds of its stock had been retired to the treasury for non-payment of assessments, although I knew there were many assessments, but the stockholders had paid the assessments because they thought enough of the company to pay those assessments. I think there were about eight of them. I believe the most active interest that the Union Company had in 1938 was the interest it had in the well to be drilled in Torrance. Plymouth Oil Company had a capitalization of a million shares.

(Testimony of Sidney Fischgrund)

Q. Can you tell this Court and the jury why it is that the Plymouth Company did not acquire these oil leases in the Torrance Field and drill those two Plymouth Company wells and issue its own stock against the interests in those wells? Why is it that they had to make this deal with the Union Associated Mines Company?

Mr. Cannon: Objected to as being immaterial.

The Court: He may answer.

A. The Plymouth Oil Company was formed—we resolved we would never sell stock to the public. As far as we were [216] concerned, we wanted to acquire all the leases we could in proven and unproven fields and prospective oil fields, and if those leases became valuable we wanted to capitalize on them, and we had numerous leases before we entered into this agreement. For instance, there was this lease in the Carmelita Field, and that lease in that territory would have been very valuable if that well had come in. We were very certain it would come in.

Q. Mr. Fischgrund—

A. I am trying to explain to you why we did not sell stock in the Plymouth Oil Company, because we had accumulated these leases and we had resolved not to sell stock in the Plymouth Oil Company, it was to be a closed company, and the plan was submitted that the only way by which you could develop an oil company is to create goodwill and to create an asset that you could capitalize on. Then this plan was submitted whereby the stock would be acquired and the Union Associated Mines, with its background and stockholders and the ability that it had to be listed in Salt Lake City on the exchange there, and the background of those people who were acquainted

(Testimony of Sidney Fischgrund)

with the company, it would acquire something of value then which would be our means of further drilling operations.

Q. Well, a—pardon me. Have you finished?

A. No, I have not. By the acquisition of the stock and the means by which we could enhance the value of that stock, it would enable us to continue drilling other wells in Southern California. (Tr. 1306-1308)

(Witness continuing)

It was one of the plans to re-list the Union Company stock on the Salt Lake Stock Exchange, and it was re- [217] listed. Plymouth Oil Company was a new company. The Union Associated Mines was an old company, and it had stockholders and apparently they believed in its directors. It had the good faith of those people who were members of the company, and we could depend on the list of Union Associated Mines stockholders to sell other stock, provided they had something to show, something of value. (Tr. 1308) All things were taken into consideration, along with the fact that the Union Company had been listed and it would be easier to relist it on the Exchange. The Plymouth Company was a new company, and in an attempt to sell stock to finance the drilling of a well in California by a new company at that time, that had no stock, had no background at all, the means by which that would be done was almost impossible, and this plan of obtaining stock in the Union Associated Mines Company and seeing that it had something of value behind it would enable us to proceed with the further sale of the stock and the drilling operations. In order further to continue drilling operations, there was a purpose in mind in this deal between

(Testimony of Sidney Fischgrund)

the Plymouth and Union companies, to sell the stock of the Union Company in order to acquire money so we could continue drilling operations. I believe that in September, 1938, I knew how many shares of stock the Union Company had in its treasury, but I don't remember now. But I believe that a block of 635,000 shares came out of the treasury of the Union Company. I do not remember that these shares were issued in one certificate to Mr. Schirm, but I do know that all of these certificates were issued to Mr. Schirm merely as an accommodation to the Plymouth Oil Company, and, as I understood it, as street stock. I have since learned that is the customary means by which one sells stock when they acquire a block of stock of that type; and I understand that is customary. [218] I did not know about the larger certificate of 635,000 shares of stock issued in Schirm's name, but I do know of certificates in smaller denominations which were issued for the purpose of having certificates sold to the public, so as to acquire money for further drilling operations that we had anticipated. Mr. Lacy had no obligation to finance the drilling of that well at all, but afterward, when we couldn't sell the stock, out of consideration for Mr. Gordon Mr. Lacy actually advanced \$40,000.00 towards the drilling of the first well. There was no obligation on his part either in writing or otherwise. I believe Lacy furnished money for the drilling of the second well, but he was under no obligation to do so. I do not know it to be a fact that he advanced approximately \$75,000.00 out of his own personal funds to the Plymouth Company for the drilling, but I believe he did. Well No. 1 was drilled in a very short period of time. I believe Lacy advanced a certain amount of

(Testimony of Sidney Fischgrund)

money progressively, as he was called upon to do so, as the well was drilling; although he had no obligation to do that whatsoever. I would not say it was gratuitous because we intended to pay him back, and he would not have advanced the money if he did not intend to get his money back. I did not ascertain for myself what the initial production was on the first well when it came in on December 13. Everyone was excited, and some said it was producing one amount, and someone else said it was producing other amounts, but I do not remember the specific amount. You cannot tell by the manner in which the oil was spurging out of the well the amount of production on the first day. I did not know that the pumper furnished daily reports. I do not think there was a pumper on the well at that time. I do not think the pumper reports were in existence at all at the time, and I [219] think the man who drilled the well said that the well was producing around 250 or 300 barrels, or some such amount. It is not my contention that the pumper reports were not issued every day, but I say that they were not in existence so far as we were concerned at that time, and I never did look at those reports. I never went out to see how good my investment was in the Union Associated stock because I was satisfied to take the statements of those around the office and around the well who said that the well was in production. At that time I believe I was the owner of 20,000 shares, and had spent over \$500.00 for this stock. I went in and spoke to Davis every day about the well, and he said it was producing at some figure or other, and I don't remember now what it was, but somewhere around 200 a day, as I remember. Davis was the field supervisor, out there

(Testimony of Sidney Fischgrund)

every day in the field, and he was the accountant for the Plymouth Oil Company, and was the logical one to have the information about the production of the well. I have never seen the log that was furnished by the Plymouth Company to the State Commission, showing the initial production of that well. I spoke to Mr. Davis on numerous occasions about the production, and he told me what it was, and I don't remember now what it was. (Tr. 1317)

(Witness temporarily excused.) [220]

RUSH M. BLODGET,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Rush M. Blodget, and I am Executive Vice-President of Oil Producers Agency, an independent association of oil companies. I have known Fred V. Gordon since 1900, and I know his reputation in this community for truth, honesty, and fair dealing, and it is good. I do not know the defendant Chris E. Schirm.

Cross-Examination

By Mr. Manster:

I do not know anything about Mr. Gordon's connection with the Plymouth Oil Company, or about his transactions between the Plymouth Oil Company and the Union Associated Mines Company.

(Witness excused.)

WARREN D. WILSON,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Warren D. Wilson, and I am in the oil and real estate business, but retired. I have lived in Los Angeles since 1899. I know Fred V. Gordon and have known him for 35 years. I know his reputation in this community for honesty, integrity, and fair dealing, and as far as I know, it is good.

Cross-Examination

By Mr. Evans:

I do not know of Mr. Gordon's transactions in connection with the Plymouth Oil Company, nor with the Union Associated Mines Company.

(Witness excused.)

C. C. SPICER,

a witness called on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is C. C. Spicer, and I am principally in the oil business, and am President of the Republic Oil Company. I know Fred V. Gordon and have known him since 1908 or 1909. I know his reputation in this community for truth, honesty, and integrity, and it is good.

(Testimony of C. C. Spicer)

Cross-Examination

By Mr. Manster:

I do not know anything whatever of his activities in connection with the Plymouth Oil Company or the Union Associated Mines Company.

(Witness excused.)

RAYMOND S. BLATCHLEY,

a witness called on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Raymond S. Blatchley, and I am a consulting oil and gas geologist, and practice in Los Angeles. I know Fred V. Gordon and have known him about 18 years. I know his reputation in this community for honesty, integrity and fair dealing. It is very good.

Cross-Examination

By Mr. Manster:

I do not know anything about Mr. Gordon's connection with the Plymouth Oil Company, nor with Union Associated Mines Company.

(Witness excused.)

M. P. WAIT,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is M. P. Wait, and I am a consulting engineer, and practice in Los Angeles. I know Fred V. Gordon and have known him about 50 years, and I know his reputation for truth, honesty and integrity in this community, and it is excellent.

Cross-Examination

By Mr. Manster:

I have never heard anything of the Plymouth Oil Company, organized by Mr. Gordon, nor the Union Associated Mines Company, nor do I know anything about his connection with those companies.

(Witness excused.)

SIDNEY FISCHGRUND,

recalled as a witness on behalf of the Defendants, having been previously duly sworn, testified further as follows:

Cross-Examination

(continued.)

By Mr. Manster:

I have read the testimony that I gave before the Commission Examiner back in 1940, and in answer to the question as to why the Plymouth Oil Company did not proceed to drill the wells and dispose of its own stock, I answered that I must admit it was a very foolish contract, as I look back at it now; and I further testified that it

(Testimony of Sidney Fischgrund)

appears as though a half interest in the well was given for stock that had some value, but [223] not the value that it should have for the stock received. If I had had my way about it, I would like to get the stock that was paid to that company because the one that suffered in the case was the Plymouth Oil Company. It now seems to me as though it was a foolish contract by virtue of what occurred as a result of everything that followed afterward; but if the well had been successful and the well had come in it would have been a very wise contract because the Plymouth Oil Company would have been able to finance two or three wells, by reason of the sale of the stock, and could have drilled the first well and possibly drilled a second well. By doing that the Union Associated Mines Company would have had real assets, they would have had a 50 per cent interest in one well and a 40 per cent in another well, after all expenses were paid, and by doing that we could have created goodwill as far as the Union Associated Mines is concerned, and we could have relied upon them for further financing, and furthermore, the Plymouth Oil Company would have had a 50 per cent—a 30 per cent interest in one well and a 40 per cent in Well No. 2, and by that means it would have had credit and assets of its own. So the whole thing depended upon the production of this oil, and we were very sure that it would have produced oil by virtue of the place where the well was drilled. I believe Gordon and I discussed this contract before it was prepared and executed (Tr. 1332), and I do not believe that I put it to Mr. Gordon to the effect that it was a foolish contract; but I believe Davis, Siens and I were discussing it, because Mr. Gordon was not here very much of the time,

(Testimony of Sidney Fischgrund)

and I believe I did say that this looks like a foolish contract, before it was prepared. I do not remember what Siens and Davis said in answer to that statement, because that was about six years ago. I believe we discussed this contract [224] with Mr. Morgan, but Morgan did not suggest it looked like a foolish contract. It looked like a very wise contract to them, and I believe it was, but it looks foolish for Plymouth because the wells did not come out right. Siens, like a lot of other individuals who were around the office, had no direct authority as far as the Plymouth Oil Company was concerned, but he was around there and engineered many transactions with this company and with other companies. He used the stationery of the Plymouth Oil Company with great liberality and I was in the office, or at least in an adjoining office, at the time. He never did ask me for permission to use the stationery. Those who were interested in working with us in developing an oil company had the privilege of using the Plymouth Oil Company's stationery to write letters. I knew Siens was using some of the stationery. I did not see any of the letters that passed between Siens and Morgan, although I knew that he was writing Morgan and other persons; but I did not protest to him against the use of the stationery; nor did I ask Gordon whether he had given Siens authority to use it.

At this point, it was stipulated between counsel that if Paul Grimm, who was present in Court and stood up in Court, was sworn, he would testify that he was president of the Pacific Western Oil Company, and in the oil business; that he has known Fred Gordon for many, many years in the County of Los Angeles, and that he knows Mr. Gordon's reputation for truth, honesty, and integrity

(Testimony of Sidney Fischgrund)

is good. And it was stipulated further, that if he were asked as to whether he knew anything about Mr. Gordon's connection with the Plymouth Oil Company or the Union Associated Mines Company, he would testify that he did not.

The same stipulation was made as to Mr. Dickey, [225] who is vice-president of the Farmers & Merchants Bank of Los Angeles, and has been acquainted for many, many years with Fred Gordon, and knows of his reputation for truth, honesty, and fair dealing in the community, and that it is good; and also that he would testify, if so sworn, that he did not know of Mr. Gordon's connection with the Plymouth Oil Company or with the Union Associated Mines Company. (Tr. 1336)

(Witness Fischgrund continuing)

Siens also made use of my stationery. I did not know it at the time. He did not ask permission to use it, but I do not think I would have objected if he had taken some of my stationery to write a letter. I did not know that he was writing to Morgan on my stationery, although I knew he was writing to Morgan. I know now that he used my stationery, but I did not know it at the time. The letter of September 6, 1938, signed by Siens and addressed to Morgan, is on my stationery. I do not know why he used my stationery in writing that letter, but I did not reprimand him for it. I did not know about the letter until now. He did not discuss with me the contents of that letter before he wrote it. Apparently my secretary did not write it because it does not bear her initials in the corner, and it is quite evident that Mr. Siens wrote it himself. (Tr. 1338) I have formerly

(Testimony of Sidney Fischgrund)

testified that I was not aware of any negotiations between Adkisson and Barclay or Morgan with respect to raising the market on the stock. I never saw, before this time, the letter of November 28, 1938, which is part of Exhibit No. 14, written on the stationery of the Plymouth Oil Company. That letter does not bear any initials of my secretary, and it apparently was written by Siens himself. I did not discuss the contents of that letter with Mr. Siens, or with Mr. Morgan, or Mr. Gordon. (Tr. 1340) I do not remember any statement made to the Board of Governors [226] of the Salt Lake Stock Exchange in connection with a registration statement; but I do remember assisting Mr. Davis in compiling certain information, as much as I could, in connection with the registration statement to the S. E. C. Such information as I had, such as that having to do with the formation of the company, and which information Mr. Davis did not have, I gave to him. Referring to the letter dated September 14, 1938, in Exhibit 14, signed by Siens and addressed to Morgan, I do know about certain things in that letter, and certain things I do not know. I did not discuss the ideas set out in the first two paragraphs of that letter with Mr. Siens, but perhaps he had in mind the fact that the Union Associated Mines already had a permit and had stock outstanding, while the Plymouth Oil Company had no permit to issue any stock in this State. The statement in that letter, "We know to start with that we have to submit a statement of Union to the Government department," would not necessarily refer to the registration statement filed with the S. E. C. The State of California is a Government department. I do not know what he had in mind, but that may very possibly be what

(Testimony of Sidney Fischgrund)

he had in mind. There were so many things going on in the office. I was trying to take care of my own work, and whenever things would come up, we would discuss them. After six years it is impossible to remember every conversation that took place in the office. I regarded this particular venture at the time as having prospects of profit to me, but it was impossible to take care of everything that was going on in that office, at the same time, without abandoning my own office. I had an investment in the stock of the company of \$500.00. I prepared the contract between Collins and Siens, referring to the sale of the million shares of stock. Collins did not occupy an office in the Plymouth suite. He [227] had an office right across from Mr. Dunnigan for which he paid rent separately. Siens and Collins, however, were talking there almost every day. I discussed with Collins the terms of this contract, Government's Exhibit 25 in evidence, and I noticed that it calls for the sale of a million shares of stock in equal monthly installments ranging from $2\frac{1}{2}\text{¢}$ to 30¢ a share. I discussed with Collins the asset value of the Union Company in this fashion, that every month those wells would be on production, the value of that stock would necessarily increase, and if at the end of the year those wells were producing the same amount that other wells in that territory were when they first brought them in, it would be worth more than 30 cents a share. Therefore, its value was dependent on each month's production. (Tr. 1344) I remember in one letter Siens suggested that it would be better to have three wells producing 100 barrels a day than it would be to have one large well, because the prospects of a large well declining in production are greater than smaller wells on production,

(Testimony of Sidney Fischgrund)

and our plan was to get three steadily flowing wells, and discussed this with Collins who did not know much about the oil business, nor did I, but I had observed that in this area there are wells that have been on production for 20 or 30 years. We were interested in getting enough out of the stock to drill about three wells, and we figured that the wells would cost about \$30,000 apiece. Mr. Lacey had no agreement and was under no obligation to advance money for the drilling. I believe Mr. Collins was experienced in the sale of stock. Dunnigan and I filed an answer in respect to the suit that Collins brought against the Plymouth Company and certain others. The purpose of this contract was to sell the stock through a man who had experience in the sale of stock, in order to get funds with which to drill these three [228] wells. I did not know that Collins hired various salesmen to help him in the distribution of the stock. I had not met Mr. McEvoy until afterwards; until after the agreement was signed. He was in the office several times but I do not remember the specific dates. I met Murphy, but it was my understanding that he was not a salesman, but that he and Collins were together in a sort of joint venture. I do not know of any particular arrangement that Collins had with Murphy and McEvoy, but it was my impression that they were all together in this joint venture. I do not remember now when it was that I discovered that McEvoy and Murphy were selling stock; but I do remember being present at a conversation in the Plymouth office when Collins, and Gordon, and Davis, and Siens were discussing the value of this stock and the production of the well and the dividends that would be paid. I do not recall any prospective investors coming to the office to

(Testimony of Sidney Fischgrund)

purchase stock. I do not recall seeing Hampton until afterwards, when he began to come to my office about once a week trying to get his money back, after the wells had proven that they were not on production any further. I did not meet Dr. Williams. I do not know him. It is difficult to remember the conversations that took place with respect to how much the wells were producing. My memory seems to go back to the time when the well was brought in and where someone was coming in the office and saying something like to the effect that the well was producing 250 barrels a day, and would do better after it had been clean out; and then some one else would say that the well was producing 200 barrels. When all of this conversation was taking place about the production of the well, I do not think the pumpers' reports were there; but if they were I think they were figured in inches, and I tried once to figure them out in inches. I could not figure it out. (Tr. 1350) In connection [229] with the Collins contract, it was our plan that each month as the production of the well came in, it would be easy to appreciate or to realize the value of the stock would enhance in value every month. At first it was only on the basis of 1 cent a month, and then afterward 1 cent a share. In other words, it was our intention and purpose that if at any month Mr. Collins decided he did not want to proceed with the purchase of the stock, he could drop the contract and he would be released from his obligation. The contract was the means by which we would obtain funds with which to sell the stock and drill these wells. It was not for the purpose of raising the market price of the stock. He could have dropped that contract immediately. He sold stock under the contract at the price that it was worth

(Testimony of Sidney Fischgrund)

when he sold it. I knew that Mr. Morgan was secretary of the Union Company. He was down here a couple of times. I do not know at whose suggestion he became secretary, but I assume it was at the suggestion of the board of directors. (Tr. 1353) I do not remember discussing with Siens about Morgan's becoming secretary and treasurer of the Union Company. I know that Bray became president of that company. I believe there was some discussion in the office about his becoming president of Union Associated. He is a man of fine reputation and they wanted someone who knew something about the oil business up there. I believe Bray was paid various sums of money by checks drawn by the Plymouth Oil Company and signed by me and by Guy Davis. My signature appears on the seven checks which you show me, commencing with October 7, 1938, and extending to December 22, 1938. They are payable to Mr. Bray. Bray had done a lot of work in helping me out in one field and I don't know but what some of these checks may have been for work that he had done in con- [230] nection with the Plymouth Oil Company. I knew he spent several days with me out in the Carmelita getting leases, and I think he did other work. I do not know what the checks were for. There was no connection between the Union and Plymouth Companies so far as actions by their respective boards of directors were concerned, except as it has been related here. I know of a splitting arrangement between Collins and Siens with respect to profits to be made on the contract. (Tr. 1357) After the agreement was made, Siens and Collins apparently had some agreement whereby they would benefit by any increase in the value of the stock; in other words, if they sold it for

(Testimony of Sidney Fischgrund)

more than the contract provided, Collins, Siens, McEvoy and Murphy were to get a certain amount of the profit. But this was after the agreement was prepared, and was an arrangement among themselves. Afterwards this splitting arrangement was incorporated into a formal contract which I believe I prepared, but it is pretty hard for me to remember. I have heard some testimony here with respect to the lease that Gordon executed to Millener and that Millener executed to the Union. I believe we prepared the lease in the office, that is, the lease from Gordon to Millener, but I do not remember anything further.

Re-Direct Examination

By Mr. Blue: . . .

I did not at any time state to Mr. McEvoy, and at no time in my presence was any statement made to the effect that the production of Plymouth Well No. 1 was 350 barrels.

(Witness excused.)

GUY B. DAVIS,

a witness called by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination [231]

By Mr. Blue:

My name is Guy B. Davis, and I am named in this indictment as one of the co-conspirators; but I have not been indicted. I am an accountant and secretary-treasurer of Plymouth Oil Company, and have been since its organization in 1938; and as such have been in charge of the books and records of the Plymouth Oil Company.

(Testimony of Guy B. Davis)

Those books are in the hands of the prosecution. I was subpoenaed to appear here by the Government, and as a witness for the Government but I was not asked to appear in court. In this subpoena I was asked to bring with me all of the books and records of the Plymouth Company, including pumping reports, copies of reports given to the Division of Oil & Gas, and the minutes of the corporation. I have given a statement to the Securities and Exchange Commission over a period of years, at three or four different times. Prior to my association with Plymouth Oil Company I was chief accountant for the Richfield Oil Company for about 9 years. I have been doing accounting work all of my life. During the last 15 years I have specialized in oil accounting. (Tr. 1361) While I was with the Plymouth Oil Company I took care of the field work involved in checking over the wells while drilling and after the wells became producers. I supervised the drilling and the production. I have seen the report embodied in Plaintiff's Exhibit 40 in evidence, consisting on pumpers' report on Plymouth Well No. 1, on Plymouth Well No. 2, and the third document being a gauge to determine the barrelage in the tanks. I delivered these very reports to Mr. Evans and to Mr. Manster. The first report that appears in that particular file, Exhibit 40 in evidence, is as of December 15, 1938. The well did not come in on that date, but it was brought in on December 14, 1938, but the pumpers' report for December 14 is not there because the well was not [232] turned over to the pumper until the 15th; it was still in charge of the drilling crew until it was turned into the tanks and cleaned up. I was there shortly after the well came in. It was less than an hour after the

(Testimony of Guy B. Davis)

well came in and it was flowing by heads. That is, it surges out and quiets down and surges again. In my oil experience I have at times been present when completions of wells were made and saw oil coming out of the well for the first time. I discussed with the operator or someone at the well my belief as to the production of that particular well; and I expressed my opinion to Bryan, the superintendent, that it looked like a 225 or 250 barrel well; and Bryan agreed with me, but he thought maybe it was a little more than that. I imagine I was there an hour or so and then came back to town, and I told certain members of the Plymouth Company in the office as to my conclusion as to the initial production of the well, and told them it was about 225 to 250 barrels, according to my estimate. The gross number of barrels produced by Plymouth Well No. 1, from the time it was brought in to December 31, 1938, was 2045.4 barrels, according to Exhibit 40 (Tr. 1367), and I believe I notified the Union Associated Mines Company as to the total of that production. I never told anybody that in my opinion Well No. 1 did 350 barrels a day, and I never heard anyone say that. I did not tell anybody, with reference to No. 2 well, that it came in for 500 barrels, or 550 barrels and was capable of doing 1,000 barrels a day; and I do not remember ever hearing any of the defendants make such a statement; nor did I hear Mr. Siens, Mr. Adkisson, nor Barclay say that. I never did hear Adkisson or Siens make any statements with respect to the production of the well. Plymouth Oil Company completed Well No. 1 and Well No. 2, and that company drilled a third well in the Torrance Field. [233] I know Mr. Schirm, but he was not employed by the Plymouth Company, and as far as I

(Testimony of Guy B. Davis)

was concerned, he never got a five cent piece from that company. I would not say definitely when I last saw him in the office of the Plymouth Company. I heard about an argument that he had with Siens, and after that Schirm was never in the Plymouth office very often, if ever. (Tr. 1370) In taking care of the books and records of the Plymouth Company I never at any time did anything or made any entry in those books that was not correct. Nor did I ever make any untrue statement to anyone. Fischgrund, Gordon and I were directors of that Company, and still are. I never heard Fischgrund or Gordon say anything in reference to the business of the Plymouth Company that was not true; and I never did enter into any conspiracy to defraud anybody or to commit any act to violate the Mail Fraud Statute or the Securities Exchange Act. Gordon nor Fischgrund never drew any salaries, and Fischgrund never drew any money for legal services. I became associated with Plymouth in August, 1938, and first began to receive a salary sometime in 1939, after well No. 1 came on production. I then received \$200.00 a month, and outside of that compensation I received nothing. I own 20 per cent of the Plymouth Oil Company.

Cross-Examination

By Mr. Manster:

I am not employed by Mr. Gordon, although my office is in the same suite with him. I do accounting work for some of the companies which he is president of, and receive remuneration for that from those companies. I regard Gordon as a fairly profitable account, as far as his connections are concerned. I do some work for Roy

(Testimony of Guy B. Davis)

Lacey, and get paid for that. My estimate of the well as it was flowing by heads was 225 barrels. The report filed with the Oil & Gas [234] Division shows that the initial production of that well was 124 barrels per day, as of December 14, 1938. I prepared that information in the report and filed it with the State Division of Oil & Gas. My estimate of 225 barrels a day was the day before December 14. No, I mean it was made on December 14. In explaining how it is that I estimated it was producing 225 barrels, and the report showed an initial production of 124 barrels, I would say that the report was filed and dated December 26, 1939, or about nine months after the well started to produce; and the figures shown on there are no doubt the average clean oil produced, maybe, for the first month.

Q. Well, I am asking you to explain this difference of about 100 barrels.

Mr. Cannon: I submit he has already answered. It is an average and the average figured out of 124 barrels a day as shown by that report for 17 days, and at the end of the month that is 2,008 barrels.

Mr. Manster: Well, that is Mr. Cannon's interpretation of the witness' testimony. I will object to any comment. He is a very astute lawyer.

Mr. Cannon: Thank you. (Tr. 1375-1376)

(Witness continuing)

There is nothing in the report as filed that shows it was the average, but the report itself shows it was rather hazardous to estimate the production of a well which flows by heads, and there is bound to be a difference. I became a director and officer of the Plymouth Company at the suggestion of Gordon and Dunnigan.

(Testimony of Guy B. Davis)

Re-Direct Examination

By Mr. Blue:

“Clean oil” is oil with less than one per cent [235] impurities of mud, emulsion, water, and sand.

Re-Cross Examination

By Mr. Manster:

This report, Exhibit No. 41, with reference to the initial production of Well No. 2 shows that the well finally developed 30 to 40 per cent wet.

(Witness excused.)

JOHN H. MORGAN,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is John H. Morgan, and I am 50 years of age, and live in Salt Lake City, and I have a family consisting of three girls and two boys. I am a lawyer and sometimes referred to as “Judge Morgan” because I was for sometime a Judge on the Municipal Court bench in Salt Lake. After my term as such Judge I retired to private practice, and I am still so engaged in Salt Lake. I first met Gordon about 1926, when he came to purchase the LaBarge Field from the Scoffields. It was quite an important deal, some five million dollars, and I knew Gordon at that time. I remember Gordon very well because of the importance of the deal, and Gordon was handling it. That was about 1926. Gordon had with him a million dollar cashier’s check and it was an important fact

(Testimony of John H. Morgan)

as far as we natives were concerned. (Tr. 1380) I met him again in the fall of 1938, after Siens and Adkisson had been in Salt Lake. The Plymouth-Union deal first came to my attention through a letter that had been written to me by Schirm in which he said that Preston had informed him that Union Associated was a Utah Corporation and had certain outstanding stock, and had formerly been listed on the Stock Ex- [236] change, and Schirm asked me to check on it. I did through Mr. Clayton, because Clayton was familiar with the company and I got information from him that the Perri family owned approximately 200,000 shares of this stock, and that there was outstanding about 740 or 750 thousand shares of it. (Tr. 1381) The information with respect to the existence of the Union Associated Mines Company came to me from Schirm. Then Clayton contacted the Perri family because he had known Mr. Perri who had been manager of the company. Clayton had an option agreement for the purchase of 200,000 shares of the stock for \$800.00, as testified by Mr. Adkisson, and \$800.00 was paid to the Bank for the stock. Thereafter I drafted the minutes of the stockholders and directors of the Union Associated Mines Company, which minutes have been offered and received in evidence. From time to time thereafter, I conducted correspondence with Siens and other persons as reflected in the exhibits, in evidence. I tried to answer all correspondence that was sent to me. I voluntarily delivered to the Securities and Exchange Commission all the books, papers, and correspondence that have been offered and received in evidence. They were in my office a number of times, and I turned all of my files and records over to them without any subpoena, and I

(Testimony of John H. Morgan)

did not make any extractions from those files, but they and I went over everything together, and I gave them everything they wanted. I never attempted to conceal or hide anything from them, and I have had several interviews with them. I discussed this proposed transaction between Plymouth and Union with the Securities Exchange officers in Utah; Mr. Gull who was the director at that time. I laid the plan before him and I discussed it in detail, and he requested me to write a letter outlining it, and I did so, and that letter is offered in evidence. I remember a letter in evidence written by Mr. Vrang, setting forth the plan for [237] the building up of an oil company and drilling of wells. I take that letter as being the practical beginning of a deal between Union Associated and Plymouth. I can see nothing wrong with that deal. I knew Vrang was a geologist, a graduate of Stanford, and that he had taught there, and had done a lot of preliminary work in Wyoming, and was one of the discoverers of the LaBarge Field. I knew him very well by reputation. I then received a letter from Mr. Gull of the Securities and Exchange Commission of Utah, and transmitted that information to the people in Los Angeles. From time to time I held conferences with Adkisson, Siens, and I saw Gordon once in Salt Lake as he was on his way, coming in to Salt Lake from Texas, but there was not much discussion with Gordon concerning Union Associated. I drew the papers set up on Form 10 concerning the re-listing of the stock on the Salt Lake Stock Exchange, but Mr. Orton was the accountant who prepared them. He is an accountant of good reputation in Salt Lake, and I got the information from Mr. Snow that he was a good man to make up the Form 10. In making up the form

(Testimony of John H. Morgan)

for the listing of the stock on the Salt Lake Exchange, I did not conceal or intend to conceal any facts. I do not think any fact was ever concealed. From time to time I appeared before the listing committee of that Exchange. I knew Barclay and have known him for a long time. He had been president of the Salt Lake Exchange for a good many years before his death, and was a man of good reputation. I was admitted to practice law in 1922. I made two or three trips to Los Angeles. I came down once or twice before the well came on production. I think, but I cannot be sure. I knew nothing of the productivity of the Torrance Field. I got my information from telegrams and letters as to how the well was going down, the production, and things of that nature. (Tr. 1389) I relied upon that in- [238] formation. I was once in Los Angeles and talked with Mr. Soyster, an oil engineer and geologist, and I also talked with Vrang in regard to the production of that field. Vrang is now a major in the Army, in Arizona. I do not know where Soyster is. As I now remember it, and as I consider the letter which has been read in evidence, with respect to the acquisition of leases or lands by Union as contra-distinguished from having only a contract under which the Union was to purchase a well drilled by Plymouth, I would say, as I recall it, there were a number of stockholders who thought Union Associated should acquire it, and that it would look better for Union Associated to acquire an interest in land, in the lease itself, rather than merely an interest in a well. And I wrote that letter to Mr. Gordon or Siens about it. The reason I mentioned the S. E. C. in that letter was that the report had already been made to the Securities Exchange Commission, and

(Testimony of John H. Morgan)

it was my understanding that these reports go to the S. E. C., and in that letter some reference was made by me about nondisclosure of that to the Securities Exchange Commission. That was because it had already been made known in the application for a ruling from the Securities & Exchange Commission, as to the entire plan of the Union Associated. There was not any desire on my part or any intention to conceal any of the transactions from any person. Following up the suggestion that I had made in the correspondence regarding the acquisition of lands or leases by Union Associated, I later took the matter up with Mr. Ellis concerning the lease at Devil's Den area. Gordon had told me that since it was his own property he would rather not try to pass on it himself, and for me to make an independent investigation. So, I went to San Francisco and saw Ellis, and he went into the thing very thoroughly and had his maps and logs and everything connected with it, [239] and was very much enthused about the area himself, and told me his company had spent around \$70,000, and were willing to spend another \$70,000 as they felt they could develop a field there. I saw Ralph Arnold's report, and he had passed very favorably upon the area, and I thought the Union Associated was making a good deal if they could get that 40 acres at Devil's Den, and I still think so. I made the trip to San Francisco from Los Angeles specifically to get information, and after that information was obtained I took the matter up with the board of directors in Salt Lake City of the Union Associated. Truman has been with the Union Associated from the beginning. Bray was the only other director along with me. Brown came in later, after Weeks had gone out of the picture.

(Testimony of John H. Morgan)

Weeks is a man of excellent reputation, and a construction engineer for the Southern Pacific. Brown is also a man of good reputation. They were officers and directors of the Company—Union Associated Mines. I have never concealed any of the facts pertinent to any of the matters discussed in any of the circular letters that I prepared, or assisted in preparing, and made no false representation to any one at any time. I bought 15,000 or 20,000 shares of Union Associated stock through Snow, a broker in Salt Lake, who is secretary of the Exchange, and paid the then going price for the stock and a commission. I bought the stock because I thought it was a good buy, and I still have that stock, although I did have to sell a few thousand shares of the stock that I got for my work in the company. Union Associated gave me, as is reflected in the minutes, 15,000 shares of stock for legal services, and I sold some of that stock, I would say between 4,000 and 5,000, or maybe 6,000 shares, at times when I have had to have some money, and I let some of my stock go; but I did not sell it for any other reason other than the fact that I had to [240] have some money at the time. I bought five or six times as much stock as I ever sold. I believe I bought altogether more than 30,000 shares, and bought it as an investment. (Tr. 1397) It seemed to me that the brokers were always knocking the price of the stock down, and I thought the stock ought to be at least 5 cents a share. The written reports definitely showed that the production expected

(Testimony of John H. Morgan)

down on the Torrance Field was about 150,000 barrels per acre; Soyster's report on Lot 41, indicates that. The expectation was that these wells would produce approximately 150,000 barrels per acre. As explained to me, the location of the Plymouth Well would allow at least 2 acres of drainage for each of those wells, and we were getting a full overriding royalty of 50 per cent of the first well, and if the stock was 5 cents, the 1,400,000 shares that were outstanding would be worth \$70,000, and we would get a whole lot more than that from the production of that first well. My interest in seeing the stock rise on the market was that we were drilling wells, and we needed money to drill them. If we had gotten a fair price for the stock all of the burden of that drilling would not have been thrown on Lacey. They only took in about \$11,000 or \$12,000 from the sale of stock, and were spending about \$80,000 for drilling those two wells. (Tr. 1399) As far as I know, it was the intention to repay Lacy progressively, as money would come into the Plymouth hands. Gordon was backing part of the notes to Lacy by his personal endorsement, according to the information I had received from Siens and Gordon. The letter on a letterhead of Merwin H. Soyster, Petroleum Engineer and Geologist, dated January 2, 1939, was received by me on or about the date it bears, and I relied on statements therein made.

(The document referred to was marked Defendants' Exhibit P. and received in evidence.) [241]

(Witness temporarily excused.)

OLIVER O. CLARK,

a witness called by and on behalf of the Defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is Oliver O. Clark, and I live in LaCanada, practice law in Los Angeles and elsewhere, and have been a member of the California Bar since July, 1907. I know Sidney Fischgrund and know his general reputation in this community for truth, honesty, veracity, and fair dealing, and it is good.

(Witness excused.)

WILLIAM R. LAW,

a witness called by and one behalf of the Defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is William R. Law, and I am an attorney at law, practicing in Los Angeles, and live in South Pasadena. I know Sidney Fischgrund and know his general reputation in this community for truth, honesty, and fair dealing, and it is good.

(Witness excused.)

FREDERICK M. BLOW,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cannon:

My name is Frederick M. Blow, and my business is investment supervision, on my own account. I was formerly connected with the Westclox manufacturers, but I was never a director. (Tr. 1403) I know James M. Collins and know his [242] general reputation for truth, honesty and veracity in the community in which he lives. It is excellent.

Cross-Examination

By Mr. Manster:

I do not know anything about Mr. Collins' activities with the Union Associated Mines Company stock, nor anything about his connection with the Plymouth Oil Company.

(Witness excused.)

WALTER I. LYON,

a witness called by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Walter I. Lyon. I am an attorney at law, practicing in Los Angeles. I know Christopher E. Schirm, and have known him since about 1928 or 1929. His reputation in this community for truth, honesty, and fair dealing is very good.

(Witness excused.)

JOHN H. MORGAN,

a defendant herein, called by and on behalf of the Defendants, resumed the stand and testified further as follows:

Direct Examination

(continued.)

(At this point, Mr. Cannon read Defendants' Exhibit P, which is as follows:) [243]

[DEFENDANTS' EXHIBIT P]

MERWIN H. SOYSTER

Petroleum Engineer and Geologist

4321 Clinton St. Los Angeles

ROchester 2446

January 2, 1939.

Mr. J. H. Morgan,
Utah Oil Building,
Salt Lake City, Utah.

Dear Sir:

At the request of Mr. Chris. Schirm I am giving you herewith my opinion of the oil possibilities of Lot 41, Tract 437, Torrance Oil Field, Los Angeles County, California.

This lot, which is one acre in area, is located in the heart of recent deep zone development in the Torrance Oil Field. A well drilled thereon will encounter the top of the oil sand at 4820 feet, which sand will continue to a depth of 5150 feet. The initial production will approximate 600-700 barrels per day of 27° gravity clean oil. The cost of drilling and placing on production will ap-

(Defendants' Exhibit P)

proximate \$35,000-\$40,000, and should be completed in 45 days.

I have acted as Petroleum Engineer for the Plymouth Oil Company and the Logan Petroleum Company in this area and am thoroughly familiar with its development.

At the present time Logan Petroleum Company's well No. 1, located directly across the street from Lot 41, is standing cemented above 240 feet of well saturated oil sand. This well should be completed the latter part of this week, and it is my opinion that the initial production will approximate 600 to 700 barrels per day, of clean oil.

Located 300 feet easterly from Lot 41 a well was recently completed by Felix Mallon. The records of this well are as follows:

Total depth 5150 feet.

Water shut off with 7" casing cemented at 4924 feet.

260 feet of 5", including 245 feet of perforated, landed at 5150 feet.

2½" tubing at 4961 feet with packer at 4911 feet.

Completed December 10, 1938.

Initial production 700 bbls. daily, 27.0° gravity, 1.0% cut.

Production as of December 30th was 580 barrels, 27.0° gravity, 1.0% cut.

Another well, Ray Wilton No. 2, located approximately 500 feet north of Lot 41, was drilled to a depth of 5152 feet. This well was perforated between 4820 and 5150 feet. Completed December 27, 1938. Initial production 650 barrels of clean oil.

(Defendants' Exhibit P)

In my opinion Lot 41 is located very favorably in respect to the geologic structure. The initial production of a well drilled thereon should

Mr. J. H. Morgan, -2- January 2, 1939.

approximate 600-700 barrels daily production of 26-27° gravity clean oil, the market price of which is now \$1.05 per barrel. Ultimate production from the well should be 150,000-175,000 barrels of oil during a life of 12-15 years.

Trusting that this information is what you desire, I remain,

Very truly yours,

(Seal)

M. H. Soyster

Petroleum Engineer & Geologist.

MHS-M

[Endorsed]: Case No. 15229. U. S. A. vs. Collins et al. Defts. Exhibit P in Evidence. Date Jul. 20, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

(Witness continuing)

I understand Mr. Soyster is in the Army now. I understood that he was formerly with the United States Geodetic Survey. (Tr. 1408) I did not get any money out of this entire enterprise. I lost money. I was never paid any salary by Union Associated or by Plymouth. Union Associated used part of my office, and used my stenographer, and \$30.00 a month was paid for office rent

(Testimony of John H. Morgan)

and stenographic work over a period of 10 months. That \$30.00 included also telephone service. The only other emoluments I got from this deal was 15,000 shares of stock on the first deal, and 10,000 shares, I think, on the second. I did not at any time enter into any conspiracy to defraud any person at any time. I did not think there was ever any such scheme to defraud any person at any time. I did not think there was ever any such scheme as described in this indictment.

Cross-Examination

By Mr. Manster :

When Adkisson and Siens came to Salt Lake in August, 1938, I believe the plan was developed to buy this 200,000 share block of stock, but before Adkisson and Siens came to Salt Lake I had been corresponding with Schirm and Vrang with reference to the acquisition of a Utah corporation. Referring to a letter dated July 29, 1938, contained in Government's Exhibit 15, I might say that just before this letter I was in Los Angeles in Vrang's office with Gordon, and there had been some discussion about acquiring a Utah corporation; but that was not in relation to the Plymouth-Union deal at all. It was another matter that Vrang and Schirm had in mind themselves, not with the Union Associated deal. Vrang's outline with respect to drilling an oil well in Torrance was not connected with the Plymouth-Union deal at all. Adkisson and Siens came [244] to Salt Lake to see me about August, 1938. In my correspondence with Schirm and Vrang and Siens, it was proposed to acquire a Utah company that had a lot of treasury stock and had been listed on the Salt Lake Exchange, and a company whose

(Testimony of John H. Morgan)

outstanding stock could be purchased cheaply; and that is what actually happened in the case of Union Associated Clayton had the option for the 200,000 shares for \$800.00, and that deal was consummated. At that time I knew the outstanding stock of Union Associated, and if my recollection is right it was a 3,000,000 share corporation, and there were approximately 740,000 shares outstanding, and the balance would be in the treasury. In the letter of July 29, Government's Exhibit 15, where it said "we could use to move some stock" means to sell the stock. That letter does not indicate any intention to raise the price of the stock. I think Siens and Adkisson visited me in Salt Lake as representatives of the Plymouth group. I discussed the general terms of these proposed contracts for the exchange of stock and the interests in the wells. I do not recall any conversation held as to why Plymouth Company, which had been organized to acquire leaseholds and drill them, did not sell its own stock. Under the contract, Union Company had no obligation in connection with the drilling of this well, and, using the vernacular, they were getting gravy out of this contract. Referring to letter of October 10, 1938, addressed by me to Siens, where reference is made to the acquisition of land or leases by Union Associated, I would explain that the board of directors, and a number of the stockholders, both the new and the old ones, were interested and thought it would be better for Union Associated to acquire an interest in the leases themselves, just like they did in the Devil's Den Field, and the leases in Wyoming, rather than to acquire just an interest in the well. And looking back at it, I did not think it was [245] a bad idea. I talked with both Gordon and Ellis

(Testimony of John H. Morgan)

in connection with the Union acquisition of the 40-acre lease at Devil's Den, and as to why Gordon did not convey that directly to the Union instead of first conveying it to Millener, I would say that that is a tempest in a teapot, because Gordon was president of Plymouth, and as a matter of convenience he made it to Millener and turned it to the Union Associated. But I do not see anything wrong with it. Referring to the letter of January 17, 1939, addressed by me to Siens, in explanation of the second paragraph I would say that the day before this letter was written the Listing Committee of the Salt Lake Stock Exchange met and invited me to that Committee; and one of the Hogle's men had questioned as to whether or not there were any wash sales, and had said that if there were any wash sales a stop order from the Salt Lake Stock Exchange would be issued.

(At this point, Mr. Manster read from the registration statement, Government's Exhibit 7, the following telegram addressed to Andrew J. Cavanaugh, Assistant Director, Registration Division, S. E. C., dated February 21, 1939:)

"Agreeable to your request we withdraw Union Associated Mines certification of registration pending further investigation stop. Will notify company.

"Val S Snow, Secretary,
"Salt Lake Stock Exchange."

(Witness continuing)

(Tr. 1423)

Subsequent to that, an order of investigation came through from the Securities and Exchange Commission. Clayton introduced Adkisson to Barclay because Adkisson wanted to get acquainted with brokers in Salt

(Testimony of John H. Morgan)

Lake, to help sell the stock. Drilling operations had not been commenced on Well No. 1. I do not know what, if any, arrangements Adkisson made to forward drilling reports to the Salt Lake Exchange for posting. I was never present at any meeting where that was discussed. I know wires were sent to the Salt Lake Exchange, but the idea did not originate with me at all. Snow had told me that some of the brokers did not think it looked right for wires to be coming daily to the Exchange, so I wrote Siens the letter of December 12, 1938, telling him what the reaction was. I remember Collins saw me in Salt Lake about January, 1939, but he did not mention any contract he had with Plymouth for the purchase of stock. I learned about that sometime after. Collins, when he first came to Salt Lake, asked me about the stock set up, and he visited me for only a very few minutes, and then went down and talked to Val Snow. I was not with Barclay on his visit to the Plymouth office in Los Angeles. When I visited the Plymouth office in Los Angeles, I think I heard about the Collins contract for the first time.

Re-Direct Examination

By Mr. Cannon:

I recall the printed letter of January 6, 1939, sent to the stockholders, having to do with the 2,000 barrels of oil produced from Well No. 1 between the date of its coming in and the end of December, 1938. That letter went

(Testimony of John H. Morgan)

to all stockholders of record, and to all the brokers, and a bunch of them went to the Plymouth office in Los Angeles. They were widely distributed.

Re-Cross Examination

By Mr. Manster:

When the letter of October 14, 1938, addressed by me to Mr. Siens was written, I felt that the market was too low and that the stock should be at 5 cents. I brought attention to the Soyster letter for my reason for thinking it should be 5 cents. I thought the market was being knocked down all [247] the time by Barclay selling there in Salt Lake, because the other brokers knew that Barclay was representing the California brokers; and I did not think the public interest in the stock was active enough in the face of the prospective production from Plymouth Well No. 1, and I do not think the public ever realized the value of the stock.

Re-Direct Examination

By Mr. Cannon:

I knew that when Plymouth Oil Company sold the stock at a higher price there was more money available for further development.

(Witness excused.)

(At this point, Mr. Cannon read a letter addressed to Morgan, dated July 31, 1938, beginning "Dear Judge: Yours of the 29th instant," etc., etc.)

CHRISTION VRANG

Geologist

612 Subway Terminal Bldg.,
Los Angeles, Calif.

July 31, 1938

Torrance-Lomita Field,
Los Angeles Basin, Calif.

J. H. Morgan, Esq.,
526 Utah Oil Building,
Salt Lake City, Utah.

Dear Judge:—

Yours of the 29th. inst., was received by both Schirm and myself yesterday.

There is nothing available in the "hot spot" in the Torrance-Lomita field at a bargain anymore. Since the completion of a 1,500 barrel well southerly and southeasterly from the former completions, the day before yesterday, we look for stiffer competition than ever. All good acre lots call for a bonus of not less than \$1,500.00 bonus and 20% royalty. Deals have involved as much as \$2,000.00 an acre bonus and 25% royalty, and money can be made upon those terms, too.

I am enclosing herewith a schedule "A" which should give you a comprehensive picture of how we are able to finance the drilling of a well. We are going ahead on one well on the basis outlined in Schedule "A". Mr. Gordon and his son-in-law, R. R. McLachlen have in mind a property that we are looking at today in Torrance which may suit you. If it can be had on workable terms will advise.

There is no chance of losing in the present area as long as one secures a site on structure south and Southeast of the old Torrance Field, limited, of course, by the width and length of the structure.

Would suggest that you party be ready to fly here the minute we are able to tie-up (option) a suitable piece of land. \$1,500.00 to \$2,000. will be needed to place the deal in escrow in a Torrance bank. It takes three weeks to pass the Title people. Thereafter, about \$15,000.00 will be required to drill the well in. After the hypothecated percents are returned the company will enjoy a large income, as you will see from the enclosed schedule.

I know what you require in the way of press notices and maps which we will send to you as soon as we are able to get them.

I note what you say about the Coalinga area. The recent Petroleum Securities (an E. L. Doheny company) well is good for 20,000 barrels. Geologists now predict the Coalinga district to be another East Texas oil pool at greater depth,—at the depth where the recent new sand was struck. No doubt the Bullion Mines Co. have some producing acreage in Coalinga which might net them a great fortune.

Will write again tomorrow. With best wishes,

Christion Vrang,
Christion Vrang.

[Endorsed]: Securities and Exchange Commission. Docket No. D-515. Commission's Exhibit No. 38. In the Matter of Union Ass'd. Date 11-7-40. Witness Gordon. Electreporter, Inc., Official Reporters. By Middleton.

(By and with consent of the Court, and of counsel, it was stipulated that if David H. Cannon were sworn and testified, he would testify that he is a member of the bar of Utah, and of California, and has known the defendant, John H. Morgan, in the community in which he resides in Utah, ever since before Morgan began the practice of law, and that his reputation in that community is good in spite of the return of this indictment. (Tr. 1436).)

THOMAS S. BUNN,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination [248]

By Mr. Blue:

My name is Thomas H. Bunn and I am a lawyer, practicing in Los Angeles and have been such for more than 21 years. I know Sidney Fischgrund, and I have known him since the early part of 1934. His reputation for truth, honesty, and fair dealing in this community is excellent.

(Witness excused.)

FRED V. GORDON,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Fred V. Gordon. I am 70 years old, was born in Missouri, and have lived in California since 1880. California has been my home since that time, except for about three years while I was over in the Philippine

(Testimony of Fred V. Gordon)

Islands in the Spanish-American War. Then I was in Kern County for about 4 years. I served in the Philippines from 1898 to 1900, under General MacArthur. When I returned to California I worked for railroad companies as a telegraph operator; and then went into the oil business, about 1902, and have been in the oil business ever since, having interests in Wyoming, Nebraska, Texas, Illinois, Mexico, Venezuela, and California. (Tr. 1440) That has been my exclusive business since that time. I was vice-president of California Petroleum Company, one of the largest independent companies in California, and I have been with the Republic Petroleum Company, Oceanic Oil Company, Los Cal Petroleum Company, Oil Royalties Corporation, and have been a director of several of them. I am president of Plymouth Oil Company. California Petroleum Company is the one that was sold out to the Texas Company in 1930. I have been president of the Plymouth Oil Company since its organi- [249] zation; Fischgrund has been vice-president, and Guy B. Davis, secretary-treasurer. There has been no change in the directorate since its organization. I have never knowingly done one single thing that was wrong, illegal or unethical in connection with that company or with any other company, and I have never gotten one 5 cent piece for any of the services that I have rendered the Plymouth Oil Company. I have indebted myself for the development work of that company for one-half of the expenditures, my indebtedness in connection therewith being about \$48,000. I acquired the property in the Devil's Den area in 1929, and paid \$15,000 for it in fee, because I thought it was cheap and it was oil land. I, with others, executed a lease to

(Testimony of Fred V. Gordon)

Millener, covering 40 acres of that land. Morgan had come into my office and told me that he was very anxious to get hold of some properties for his Union Associated Mines Company, and he had been working with Mr. Schirm in connection with some properties in Montebello. Morgan asked me about the Devil's Den property, and asked for a lease on it, but I told him to make his own independent investigation because I was the president of the Plymouth Oil Company and did not want to tell him anything about that Devil's Den property. He went to San Francisco and talked with Mr. Ellis about it, and returned and told me that Ellis' report was favorable. I was about ready to go to Texas or Nebraska, and I told him to take the other lease that I had on that property, and make up a lease like it, except that I wanted him to pay 6/6ths of the taxes (Tr. 1444) instead of 5/6ths because I was trying to make the land self-supporting. Someone phoned over to me and said that he would like to have the lease made in the name of Millener. I did not know who Millener was, but they told me it was all right with the Mines Company. So, I signed the lease after it was drawn, and my wife did so, too. Neither [250] I nor my wife, nor anyone else on that lease, ever received anything in the shape of money or stock or consideration for the lease, and I got no part of the 235,000 shares. (Tr. 1445) I know Mr. Collins. I first met him in February, 1944, after I was indicted, and I had never met him before, although I had heard of him. From September, 1938, until December 19, 1938, I was either in Nebraska or Texas, taking care of properties that I had there; and I would say that during the months of September, October, and November, and up to the

(Testimony of Fred V. Gordon)

17th of December, I was in Los Angeles not more than 10% of the time. I was in Los Angeles from December 17 to the first of January, 1939, when I went to Abilene, Texas, and then up to Iowa. I bought some Union Associated stock in this manner: Miss McLean was a nurse who took care of me in New York and she had been asking me if I could buy her some leases on which she could make some money, but I told her those in Nebraska were too speculative. She kept calling me up and wanted to know if I wouldn't tell her about something that she could make a little money on. So, when the Plymouth deal came up I told her if she wanted to put a little money in it, I would guarantee her against loss. I guaranteed her and the other three women who bought 40,000 shares of stock, against loss. At another time Adkisson, who had been owing me \$750 on some stock I had given him to hold for me and which I afterwards let him keep the proceeds from, told me that the only way he could pay me this \$750 was to deliver to me 20,000 shares of Union Associated stock for the \$750. which he did. I still have the stock, in the name of Lucretia J. Dean. I never entered into any conspiracy to cheat or defraud anyone in connection with this or any other deal.

Cross-Examination

By Mr. Evans: [251]

In connection with the Millener lease, I gave the old lease to Mr. Morgan and asked him to draw up a lease, and for some reason or other they made it out in Millener's name, who I understood was the agent for Union Associated. I received no consideration for it. Of course, had the lease been made directly by me to Union,

(Testimony of Fred V. Gordon)

I would have received whatever consideration was paid on the lease, but by making the lease to Millener, and then Millener making the lease to the Union, that step meant that I received no part of the consideration. (Tr. 1449) I never at any time discussed the terms of the lease with Mr. Millener. I never met him but one time. I believe he was a nephew of Mr. Siens. I had known Siens for a period of many years. I met him in connection with the Italo Petroleum Company where we were fellow directors, but I had not seen him for some time because he had been away. Siens never wrote any letters for me in connection with Plymouth Oil Company, although I understand he wrote some letters for the Plymouth Oil Company and for himself. He had no authority to write any letters for me personally. He was the greatest letter writer in the world. Siens was not paid a salary by Plymouth Oil Company; he did not receive any money, to my knowledge. I do not know where he secured funds with which to carry on his various activities in connection with that company. I had quite a number of telephone calls, long distance, during the fall of 1938 and the early part of 1939, and as I recall most of them were from Davis; but some of them were from Siens. I cannot tell you how many. I do not think I received any long distance calls from Fischgrund. I don't remember any. I never had any long distance telephone calls from Dunnigan. And I do not think I received any from Schirm. In the fall of 1938, and the early part of 1939, when I was [252] away from Los Angeles, I do not think that I requested Siens to do anything or perform any acts in connection with the Plymouth-Union deal. Now that you show me a letter ad-

(Testimony of Fred V. Gordon)

dressed by me to Morgan on the stationery of Hughes Petroleum Company, Abilene, Texas, dated January 2, 1939, I remember that I asked Siens to correct certain clauses in the lease, and gave him the names and addresses of the parties so he could get the lease signed. I did not pay much attention to the stock of Union Associated Mines because I was too busy. I did buy back the \$1,500 worth of stock from the ladies in Pasadena, about which I have testified. I later gave McEvoy a letter to one of these ladies. This letter was requested of me by Mr. Siens. Mr. Siens had no authority in the Plymouth Company. I made a deal with Lacy that I was to pay half of whatever it took to drill the first two wells, but I wanted him to advance the money, and I gave him my note for half of it. I do not remember how much it was, exactly, but as I remember, No. 1 well cost about \$38,000, and the No. 2 well cost about the same, or a little more. I still owe my nephew, Mr. Lacy, about \$48,000. During the fall of 1938, the first money for the equipment we bought was paid by Lacy and me, from a supply house, and Lacy and I gave a note for \$15,000 to get that equipment. After that, Lacy put up the money upon my promise to give a note for half of it. I know that Davis would communicate with Lacy whenever more money was needed, while I was away; but Adkisson had no authority to communicate with him. Siens never did communicate with Lacy because Lacy would not talk to him. Lacy never advised me that he would not put up any money if Siens was in the deal, but he advised me not to have anything to do with Siens (Tr. 1459), but I believe that was after he had started putting money into the well. [253]

(Testimony of Fred V. Gordon)

Re-Direct Examination

By Mr. Blue:

I never told Mr. McEvoy that Well No. 1 was producing 350 barrels a day; I never told anyone else that.

(Witness excused.)

HARRY GRAHAM BALTER,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Harry Graham Balter, and I practice law in Los Angeles, and for some years was with the United States District Attorney's office as an attorney in this district. I know Sidney Fischgrund, and have known him between five and ten years; and know his reputation in this community for truth, honesty and fair dealing, and it is good.

(Witness excused.)

LOREN A. BUTTS,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blue:

My name is Loren A. Butts, and I am an attorney at law, and have practiced for 28 years; in Los Angeles for 14 years. I know Sidney Fischgrund and have known him eight or nine years, and know his reputation in the

(Testimony of Loren A. Butts)

County of Los Angeles for truth, honesty and integrity, and it is good.

(Witness excused.)

Mr. Blue: At this time the defendants Christopher E. Schirm, Sidney Fischgrund, and Fred V. Gordon rest. (Tr. 1463) [254]

Mr. Manster: The Government rests.

* * * * *

Mr. Cannon: At this time the defendants separately and jointly renew the motions heretofore made at the close of the Government's case in chief to strike from the record the different exhibits concerning which motions to strike were heretofore made, and concerning the striking of testimony of various witnesses heretofore made.

Without specifically repeating those particular motions, each of the defendants separately and jointly move for a directed verdict on each and all of the counts of the indictment, making the motions generally to the indictment and to each count thereof.

I will not specifically mention each motion and each count and restate the counts, nor make any argument on the motions or any of them, unless the Court wants me to do so for the purpose of advising the Court of the nature of the motions and the authorities in support thereof.

The Court: Now, all of you join in that motion?

Mr. Blue: We do.

Mr. Fischgrund: We do. (Tr. 1467)

Mr. Morris: We do.

The Court: All right. The motion will be denied.

Mr. Cannon: Exception taken by each of the defendants separately to each denial.

The Court: All right. (Tr. 1468) [255]

Arguments were then made to the jury by the prosecution and by the defense; the Court thereupon instructed the jury and the following occurred:

The Court: Very well. It may be stipulated, I assume, that the jury can take any exhibits they want to into the jury room?

Mr. Cannon: It is so stipulated.

The Court: And, of course, the indictment?

Mr. Cannon: So stipulated.

Mr. Manster: We so stipulate.

Mr. Blue: And the instructions also?

The Court: Well, I deviated from those sometimes. That might not be proper.

Now, we will no longer need our alternate juror. Thank you very much for the attention you have given. You are excused now. Fortunately we did not have to use you.

(The alternate juror was excused.)

The Court: Swear the bailiffs.

(Thereupon, the bailiffs were sworn.)

The Court: You retire in the custody of the bailiff.

(Whereupon, at 11:00 o'clock a. m. the jury retired from the courtroom.)

Whereupon, at 5:15 o'clock p. m. the following proceedings occurred, at first with the jury absent from the courtroom:)

The Court: My purpose in calling you back here, possibly it could have been done over the telephone, is to find out whether it will be agreeable for the jury to return a sealed verdict.

Mr. Cannon: It is agreeable with Mr. Collins and Mr. Morgan. [256]

Mr. Blue: It is agreeable with the defendants I represent.

Mr. Manster: No objection.

The Court: All right, we will call the jury.

(Whereupon, the jury entered the courtroom.)

The Court: Have you agreed on a verdict?

A Juror: Not quite. We are working on it.

The Court: All right, you can work during the evening. In the event you agree on the verdict, you will have it signed by your foreman, as I stated to you this morning, and you will put it in an envelope and seal it and the foreman will keep it in his possession and in the morning you will all return here, at which time the verdict will be opened and read and recorded.

If you have agreed upon a verdict, if you are the foreman, seal it in an envelope and put it in your pocket and then you can all go about your business but you have to return in the morning at 10:00 o'clock.

A Juror: That means we can go home?

The Court: Yes, but you have to be back here at 10:00 in the morning, and at 10:00 in the morning the verdict will be read.

A Juror: I have some questions I would like to ask. Do I have to ask them privately?

The Court: You can ask them now. I don't know whether I will be able to answer them or not.

A Juror: We are kind of confused on the law on some of the counts. It seems to be that we don't know which count is the mail fraud and which count is the conspiracy.

The Court: The last one is the conspiracy.

A Juror: That is No. 7 on here? [257]

The Court: No, No. 11.

A Juror: And the other six—

The Court: 1 and 2 are under the Securities Act and the others are under the Mail Fraud Statute.

A Juror: 1 and 2 is the Securities Act, the next four is the Mail Fraud, and the last one is the conspiracy charge?

The Court: Yes.

A Juror: Would you mind explaining the Mail Fraud to us a little.

The Court: I don't know, I could read all those instructions again to you. That would take about an hour.

Mr. Blue: If the Court please, I would not want to have any uncertainty in the jury's minds as to what the instructions are.

The Court: If it becomes necessary we will do that, but I am not going to do that right now. Later, if you want them, I will read them to you.

A Juror: Later you will?

The Court: Not this evening.

A Juror: We are at liberty to throw out any count we want to?

The Court: Yes, you can find any defendant guilty or not guilty on any count.

A Juror: I am asking a lot of questions that I have been asked to ask. Another question is, we have to agree on all five?

The Court: No, I say you can find any defendant guilty or any defendant not guilty, or all defendants guilty or not guilty on all counts.

A Juror: You understand we might be able to agree on a couple or not a couple or three more. [258]

The Court: I don't know that I want to understand that. I just told you what the instruction was.

A Juror: I think that is clear enough.

The Court: All right. Have you gentlemen anything to add to that?

Mr. Cannon: I don't want to have the jury feel that they should decide the case, having any doubt as to the instructions your Honor gave them.

The Court: This could be read to the jury every day for a week and still they could not remember it.

Mr. Cannon: I quite agree with you on that. I am quite sure that you and the jury have what I have in mind, that we don't want a verdict of conjecture, of course.

The Court: No, certainly not, and I shall, if it becomes necessary, be very glad to re-read those instructions to you.

A Juror: Your Honor, maybe we are just a dumb jury, but we seem to think there are an awful lot of ramifications to this case. It is not as simple as some we have had.

The Court: That is true.

A Juror: I took notes of your instructions to the jury as best I could and they have helped us greatly.

The Court: We might come back here at 8:00 o'clock and the reporter can read them to you.

(Discussion off the record.)

Mr. Manster: Shall we come back at 8:00?

The Court: No, it will not be necessary.

Mr. Manster: We are through until tomorrow morning at 10:00 o'clock?

The Court: Yes. (Tr. 1697-1701) [259]

Mr. Blue: I wish to make a motion, your Honor.

The Court: State your motion.

Mr. Blue: If your Honor please, before the verdict is returned, I wish at this time to move for the withdrawal of a juror and ask for a mistrial, and as a basis for the motion I wish to say as follows: Last night at approximately 5:25 the jury returned to the courtroom; that the foreman of the jury, Mr. Hanson, at that time asked the Court certain questions: the first question, as I recall, was, What was the Mail Fraud Statute?

Mr. Manster: I think I will object to this motion at this time. I think, first of all, it should be made at the bench because it appears to be an effort to influence the jury in the return of the verdict.

Mr. Blue: The verdict is returned and it does not make any difference anyhow. I don't know what the jury's verdict is and I haven't any more right to assume it than the District Attorney here.

The Court: Go ahead.

Mr. Blue: All right. At the same time Mr. Hanson asked the Court to distinguish for the jury the various counts of the indictment, as to which counts were mail fraud and which counts were Securities and Exchange Act violations, and what count was conspiracy; at the same time Mr. Hanson asked the Court whether or not

these defendants could be convicted on certain counts and acquitted on other counts; at the same time Mr. Hanson said that certain instructions that were given were uncertain in the jury's minds.

The Court: I don't remember that.

Mr. Blue: And one of the jurors asked for instructions. I think the record will bear me out. One of the jurors asked for instructions, and a juror, a Miss Campton or Mrs. Campton, [259a] then stated that she was familiar with the instructions that the Judge had given; the Judge gave instructions consuming in the aggregate about 50 minutes, and Miss Campton, whom I noticed at the time the Judge was giving instructions, had no means of having the instructions so that she could act, let us say, as an *ex officio* judge.

Mr. Manster: I object to this criticism of the jury and I think that counsel perhaps inadvertently is incorrectly paraphrasing what happened. Now, what happened is this, your Honor—

Mr. Blue: The record speaks for itself.

The Court: The record speaks for itself.

Mr. Blue: If anything I say is not in the record, that is fine—

The Court: It is in the record.

Mr. Blue: I further state to the Court that at the time that the jury went out one of the jurors asked whether or not a copy of the instructions should be given. A copy of the instructions was not given to the jury. At the same time yesterday that the jury was in, the jury—I withdraw that—the Judge said, 'Well, I don't think it would be necessary to read all these instructions again. It would take about an hour.'

Now, I say this to the Court, that where jurors—

The Court: State your motion.

Mr. Blue: My motion—

The Court: Don't argue.

Mr. Blue: All right, my motion is based on this—my motion is to withdraw a juror and declare a mistrial on this ground, that on the preamble of what took place yesterday, the verdict that was arrived at was arrived at by speculation, it was arrived at without knowledge, and the fact that one juror did not understand or remember the instructions is sufficient [259b] to say that the verdict, whatever it may have been, was arrived at by speculation, by conjecture, by guesswork, and by prejudice.

In the second place, the jurors showed by the fact that they did not even understand the statute upon which the fundamental basis of this charge was made, and that at their request it was not read back to them, the rights of these defendants, whatever they may be—because I don't know whether this verdict was one of acquittal or one of guilty and we have no way of knowing, but assuming—

The Court: Finish your motion.

Mr. Blue: All right. I say to the Court that in view of these circumstances, these defendants have been deprived of a fair and impartial verdict by this jury and I ask for a mistrial.

The Court: Well, you will recall that the Court was not advised that the reporter had transcribed his notes. Now, the only way the instructions could be read, if they had not been transcribed, was for the reporter to read them. When I learned that he was prepared to read the instructions I asked the jury if they would like to have them read and they said no. Wasn't that what you said?

Mr. Manster: That is correct.

A Juror: We didn't need them then.

Mr. Blue: Mrs. Campton might not have needed them.

The Court: There was only one other juror asked for them.

A Juror: We had already reached a decision with the exception of one juror.

Mr. Manster: If your Honor please, the record shows that you asked the foreman of the jury on two occasions whether the jury wanted any portion of your instructions reread and on [259c] both of these occasions he stated no, and I think that is in the record.

The Court: Wasn't that your statement, Mr. Foreman?

Foreman Hanson: Am I allowed to say anything?

The Court: Yes.

Foreman Hanson: If we were confused, if Mr. Blue wants to put it that way, you straightened us out. We wanted to know which counts were mail fraud and which counts were the—

The Court: That was the portion of the instructions you wanted read?

Foreman Hanson: The minute you told us that we knew what we wanted to know.

The Court: Have you agreed on a verdict?

Foreman Hanson: Yes, sir.

Mr. Blue: I take an exception to the Court's ruling.

The Court: Yes.

(A sealed verdict was handed to the Court.) (Tr. 1704-1708) [259d]

(Title of Cause)

It Is Hereby Stipulated and agreed by and between the above named parties through their respective attorneys, that the time within which the defendants and appellants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, may prepare, serve and settle a proposed Bill of Exceptions herein, and to prepare, serve and file their Assignments of Error, all in connection with the appeal in the above entitled action, may be extended to and including the 5th day of October, 1944.

Dated: August 19, 1944.

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon

Attorneys for Defendants and Appellants

CHARLES H. CARR

U. S. Attorney

LLEWELLYN J. MOSES

Ass't. U. S. Attorney

JAMES M. EVANS

Special Assistant to U. S. Attorney

S. MANSTER

Special Assistant to U. S. Attorney

By James M. Evans

Attorneys for Plaintiff and Appellee.

It Is So Ordered: This 22 day of August, 1944.

DAVE W. LING

United States District Judge [259e]

(Title of Cause)

It Is Hereby Stipulated and agreed by and between the above named parties through their respective attorneys, that the time within which the defendants and appellants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, may prepare, serve and settle a proposed Bill of Exceptions herein, and within which to prepare, serve and file their Assignments of Error, all in connection with the appeal in the above entitled action, may be extended to and including the 20th day of October, 1944.

Dated: September 12, 1944.

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon
Attorneys for Defendants and Appellants

CHARLES H. CARR
U. S. Attorney

LLEWELLYN J. MOSES
Ass't. U. S. Attorney

JAMES M. EVANS
Special Assistant to U. S. Attorney

S. MANSTER
Special Assistant to U. S. Attorney

By James M. Evans
Attorneys for Plaintiff and Appellee.

It Is So Ordered: This 18 day of September, 1944.

DAVE W. LING

United States District Judge [259f]

(Title of Cause)

State of California

County of Los Angeles—ss:

David H. Cannon, being duly sworn, deposes and says:

That he is one of the attorneys for the above-named appellants; that a stipulation is now on file between the attorneys for the above-named parties under which it is agreed that the appellants herein may, with the consent of the Court, have to and including November 10, 1944 within which to prepare, serve and file a proposed Bill of Exceptions herein, and within which to prepare, serve and file their Assignments of Error herein.

DAVID H. CANNON

Subscribed and sworn to before me this 20th day of October, 1944.

REED E. CALLISTER

Notary Public in and for the County of Los Angeles,
State of California.

It Is So Ordered That Such Extension of Time Be
Granted.

Dated: October 20th, 1944.

WILLIAM DENMAN

ALBERT LEE STEPHENS

United States Circuit Judge [259g]

[Title of District Court and Cause.]

To:

Charles H. Carr, Esq., United States Attorney
L. J. Moses, Esq., Assistant United States Attorney
James M. Evans, Esq., Special Attorney
S. Manster, Esq., Special Attorney

Sirs:

You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions of the Defendants and Appellants, James H. Collins, Sidney Fishgrund, and Christopher E. Schirm, in the above entitled action, and that said defendants and appellants will ask the allowance of the same.

DAVID H. CANNON

Attorney for Defendant and Appellant,
James H. Collins

DAVID H. CANNON and
BEN L. BLUE

By David H. Cannon
Attorneys for Defendant and Appellant,
Sidney Fischgrund

BEN L. BLUE
Attorney for Defendant and Appellant,
Christopher E. Schirm [260]

[Title of District Court and Cause.]

It Is Hereby Stipulated that the foregoing Bill of Exceptions is correct and that the same be settled and allowed by the Court.

CHARLES H. CARR, Esq.

United States Attorney

L. J. MOSES, Esq.

Asst. United States Attorney

JAMES M. EVANS, Esq.

Special Attorney

S. MANSTER, Esq.

Special Attorney

By James M. Evans

Attorneys for Plaintiff and Appellee

DAVID H. CANNON

Attorney for Defendant and Appellant,
James H. Collins

DAVID H. CANNON and

BEN L. BLUE

By David H. Cannon

Attorneys for Defendant and Appellant,
Sidney Fischgrund

BEN L. BLUE

Attorney for Defendant and Appellant,
Christopher E. Schirm [261]

[Title of District Court and Cause.]

APPROVAL OF BILL OF EXCEPTIONS

This Bill of Exceptions having been duly presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the record in this case, and said Bill of Exceptions contains all of the evidence submitted to the trial court, except certain exhibits offered and received in evidence, but which said last-mentioned exhibits are, under Stipulation of counsel, epitomized in said Bill of Exceptions, and the originals of which are transmitted to the Appellate Court; and said foregoing Bill of Exceptions is settled and allowed, all within the time fixed by proper Orders of court.

Dated: October 28, 1944.

DAVE W. LING

Judge

Received copy of the within Bill of Exceptions this 13th day of September, 1944. James M. Evans, on Behalf of Attorneys for Plaintiff.

[Endorsed]: Lodged Sep. 13, 1944. Filed Oct. 30, 1944. [262]

[Endorsed]: No. 11037. United States Circuit Court of Appeals for the Ninth Circuit. James H. Collins, Sidney Fischgrund and Christopher E. Schirm, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 11, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11037

JAMES H. COLLINS, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

To the Clerk of the Above Entitled Court:

In accordance with Sub-division 6 of Rule 19 of the above entitled court, you are hereby advised that the appellants herein adopt as their points on appeal, the Assignments of Error appearing in the transcript of the record, and said appellants hereby designate for printing the entire transcript of the record as certified to you.

Dated: May 31, 1945.

DAVID H. CANNON

BEN L. BLUE

Attorneys for Appellants.

[Endorsed]: Filed Jul. 3, 1945. Paul P. O'Brien,
Clerk.

No. 11037

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. COLLINS, SIDNEY FISCHGRUND
and CHRISTOPHER E. SCHIRM,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Three Volumes
VOLUME III
Pages 601 to 618

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED
APR 18 1948

PAUL P. O'BRIEN,
CLERK

No. 11037

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. COLLINS, SIDNEY FISCHGRUND
and CHRISTOPHER E. SCHIRM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

In Three Volumes

VOLUME III

Pages 601 to 618

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

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In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 15229—Criminal

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

JAMES H. COLLINS, SIDNEY FISCHGRUND,
and CHRISTOPHER E. SCHIRM,

Defendants and Appellants.

ASSIGNMENT OF ERRORS BY SIDNEY
FISCHGRUND, JAMES H. COLLINS and
CHRISTOPHER E. SCHIRM.

Come now the above-named defendants and in
connection with the Appeal herein say and each
of them says:

That in the record and proceedings prior to and
during the trial of the above-entitled cause in said
District Court, error has intervened to their and
his prejudice and make the following Assignment
of Errors which they aver occurred in the trial of
said cause, to-wit:

I.

Said District Court erred in denying their mo-
tions to quash the indictment herein upon each and
all of the grounds set out in said Motion to Quash,
and requiring them to plead to the said indictment.

II.

Said District Court erred in denying their motions for an early trial of said cause.

III.

Said District Court erred in denying their motions to dismiss said indictment made prior to the time when said cause was called for trial. The grounds of said motions were, and the grounds of said error in denying said motions were and are those set out in said motions to dismiss. [1*]

IV.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, on each and all of the counts in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is, insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, to answer any of the counts in said indictment.

V.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss each and every count

* Page numbering appearing at foot of page of original certified Transcript of Record.

of the said indictment, and to acquit them on each and every count in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, and would not and does not tend to prove that the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm are guilty in any manner or form as charged in said indictment or any count thereof.

VI.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Sidney Fischgrund, James H. Collins and Christopher E. Schirm, in that the matters and things alleged in said indictment or in any count thereof do not constitute an offense against the laws of the United States. [2]

VII.

The District Court erred in denying the motions made by the said defendants after the jury had returned its verdicts in the above-entitled cause, for an order arresting the judgments on Count XI in said indictment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said Count XI in said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or

any law, or against the constitution of the United States, and particularly said Count XI does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VIII.

Said District Court erred in denying their Motions to Vacate the Judgment of Conviction and Discharge the Defendants Notwithstanding the Verdicts.

The grounds of said Motions were and the grounds of said errors in denying said motions were, and are, that the verdicts of the jury finding them guilty as charged in Count XI of the indictment, were and are contrary to law and not supported by the law and the facts involved in these proceedings.

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence, and admitting in evidence Government Exhibit No. 6, the minutes of Union Associated Mines Company which were identified by the witness Truman. The grounds of the objections and the exceptions were as follows: Mr. Blue: If the Court please, I have no objection so far as the foundation is concerned except that on behalf of the other defendants I object to the minutes as set forth on the ground it is hearsay as to them, and there is no foundation as yet laid as to in any way [3] connect any of the defendants with the preparation of these

minutes, and I therefore urge that objection to them.

Mr. Evans: Do I understand you correctly, Mr. Blue, that you are stipulating on behalf of all of the other defendants that the——

Mr. Blue: They are the minutes. There is no question about that.

Mr. Evans: ——Union Associated Mines Company and may be introduced subject to their objection as to their competency and relevancy and materiality?

Mr. Blue: And it is definitely hearsay as far as the other defendants (except Morgan) are concerned.

The Court: All right. They may be received.

Mr. Blue: Exception. (Tr. 94-95)

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Harold V. Dodd, as to the oil production in the Devil's Den area in California, the grounds of the objections and the exceptions being as follows:

By Mr. Manster:

What is known generally as the Devil's Den area embraces about two or three townships and embraces 12 to 18 sections, a section being 640 acres (Tr. 665). At any time during 1938 the highest number of wells producing in that area was 20.

Q. Can you tell us what was the total amount of barrel production from those 20 wells?

Mr. Cannon: I will object to that as being immaterial altogether. (Tr. 666)

* * *

The Court: Well, what we are primarily interested in is the value of these 40 acres, and all you attempt to show first by the witness is that this well has been drilled within three-quarters of a [4] mile away.

Mr. Manster: That is right.

The Court: And therefore we were to draw whatever inference we could from that as to the value of this land, and subsequently, on cross-examination, the witness said that it wouldn't make any difference.

Mr. Manster: We contend that is some indication of the probability of finding oil. If a dry hole is drilled within three-quarters of a mile in a particular area, we contend it is some indication as to whether or not oil in productive quantities would be produced.

Now, it has been brought out here that certain areas, certain acreage in the Devil's Den area have produced oil, and we would like to show just what the production was in 1938 and 1939.

Mr. Cannon: Then I will add to my objection heretofore given that this is an attempt to impeach his own witness.

Mr. Manster: No, I am not impeaching him at all. I am merely asking for his records.

The Court: Go ahead.

Mr. Cannon: Exception.

The Witness: 9,094 barrels. (Tr. 667-668)

XI.

That said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Paul Julian Howard, as to the assessed value of certain land in Kern County, California. The grounds of objections and the exceptions were as follows:

Q. Now in pursuance of your official duties, did you make a valuation of the oil and mineral rights of that tract known as the northeast one-quarter of the northwest one-quarter, Section 2, [5] township 25 south, range 18-E in Kern County, California?

Mr. Cannon: I will object to that as being immaterial, and no foundation having been laid.

Mr. Manster: I am limiting it to 1939 at the time.

Mr. Cannon: I will object, then, on the further ground——

Mr. Manster: I beg your pardon. It is 1938.

Mr. Cannon: I will object, then, on the further ground that there is no issue in the indictment towards which this testimony would have the slightest probative value. We are not charged with selling land for something more than it was worth, nor making any false representations to any person as to its value. It is not part of the scheme alleged. (Tr. 728-729)

Mr. Manster: We maintain it is material on the allegations of the indictment which states that these defendants leased and assigned unproven and undeveloped properties.

Mr. Cannon: It does not go to the value. It goes to the proven or unproven.

Mr. Manster: We maintain, Judge, that the valuation of oil and mineral rights placed by the responsible State official who is charged with that function, is extremely relevant and material on the issue of whether this particular tract was proven and developed or not.

Mr. Blue: May I say something? Pardon me, Mr. Cannon. There is no witness that has appeared to justify any assumption that there was any representation made that this land was proven and/or developed.

Mr. Cannon: That isn't the point that I am making now.

The Court: That isn't the point. (Tr. 729)

* * *

Mr. Cannon: The point I am making now, Mr. Blue, is that there is no allegation here with respect to any part of the scheme having [6] anything to do with the value of the land.

The Court: Well, only in connection with whether it was proven or unproven.

Mr. Cannon: I say the assessed value.

The Court: If it were proven, I suppose it would have a higher assessed value.

Mr. Cannon: Probably.

The Court: You can limit it to what he based his valuation on.

Mr. Cannon: Of course, I will submit to your Honor's ruling, but reluctantly, and take an exception, and I would like the objection to stand as to this entire line of questioning covering this tract. (Tr. 729-730)

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank L. Tucker, concerning conversations he had with one Murphy and concerning disposition made by the said witness of certain stock in Union Associated Mines Company. The grounds of the objections and the exceptions were as follows:

Q. And tell me, if you will, the conversation between you and Mr. Murphy with relation to the Union Associated Mines stock.

Mr. Cannon: Objected to, if the Court please, on the ground it is hearsay. It can have no bearing on the issues in the case. May I ask a question on voir dire?

The Court: Yes.

Mr. Cannon: Did you ever talk to any of the defendants before you bought any of this stock?

The Witness: No, sir.

Mr. Cannon: Or with Mr. Adkisson or Mr. Barclay?

The Witness: No, sir.

Mr. Cannon: I object on the ground it is hear-

say, no proper or any foundation is laid for it at this stage of the proceedings. [7]

The Court: He may answer.

Mr. Cannon: Exception. May I have an exception running to it all, if the Court please?

The Court: Yes. (Tr. 869)

* * *

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased?

A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. (Tr. 883)

* * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes. (Tr. 884-885)

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank Veloz, concerning certain conversations had by the witness with one Murphy. The grounds of the objections and the exceptions were as follows:

Q. Tell us what Mr. Murphy told you with relation to the securities [8] of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objection runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken?

The Court: Yes.

Mr. Cannon: Thank you. (Tr. 957-958)

XIV.

Said District Court erred in denying the motions

to strike certain evidence from the record made on behalf of each of the defendants. The grounds of said motions and the rulings thereon and the exceptions taken thereto were as follows:

Mr. Cannon: If the Court please, at this time I want to make some special motions to strike, if I may have the Clerk's list of exhibits?

First, I want to move to strike on behalf of all defendants, to strike from the record Exhibit 41 in evidence, copies of a log of an oil or gas well, Division of Oil and Gas, on the ground that no proper or any foundation has been laid for the introduction in evidence of that document; on the further ground that on its face alone it shows to be incompetent, and on the further ground that it is a narrative of past event.

They are copies, not the originals. No witness has [9] produced to identify them except the fact that they got them from Plymouth Oil office. They are dated September 26, 1939, purporting to set up what occurred on December 14, 1938. (Tr. 1069)

They are not signed by any witnesses produced. One of them bears no signature, typewritten or otherwise, and the other one, attached to the sheet, is dated June 20, 1939, purporting to reflect what occurred on February 28, 1939 (Tr. 1070)

Do you want to rule on them separately, or shall I make them all at one time? May I pass this to the bench? It is hearsay as to all the defendants.

The Court: There is one that bears the signature of Mr. Lacy.

Mr. Cannon: But the signature has never been

identified. The witness was never produced. No person was offered as a witness to testify as to the regularity of the keeping of the document or the circumstances under which it was prepared, or where the original was filed.

I insist on all of them, but the primary objection is that it purports to be a narrative of past events.

The Court: I will deny your motion.

Mr. Cannon: Exception. I move at this time to strike Exhibit No. 27, which is a check No. 191, dated January 7, 1939, given to John McEvoy for \$100, signed by Mathilda M. Klinger, and also Exhibit No. 28, a check of March 1, 1939, given to Mr. McEvoy for \$20, signed by Mathilda Klinger, and Exhibit 29, certain stock certificates of Union Associated Mines Company, being stock certificates delivered to Mathilda M. Klinger on the ground that each and all of those exhibits are hearsay as to these defendants, and to all of them, there being no connection shown with those checks, receipt of the money for the stock, or delivery of the stock by any of the defendants to that witness. (Tr. 1071)

The Court: Your motion will be denied.

Mr. Cannon: Exception. [10]

* * *

Mr. Cannon: I move to strike Exhibit No. 50 which is a check of Fred L. Hunter for \$147.50 to R. L. Colburn, it being hearsay as to all the defendants and incompetent, irrelevant, and immaterial, and no proper foundation laid for it.

I can relate the circumstances, if your Honor is not familiar with them.

The Court: I don't recall that. (Tr. 1072)

Mr. Cannon: That is the transaction where Mr. Tucker said he had the transaction with Colburn & Company, and that Murphy suggested to him that he place an order through some brokerage, and when he asked him if he had any preference and Tucker said that he had not, the order was placed with Colburn & Company. He made the check payable to Colburn. Murphy is not even an alleged co-conspirator. It would clearly be hearsay as to all these defendants.

The Court: Do you remember where that testimony was?

Mr. Cannon: I can't give you the page, but I can give you the day he testified on it.

Mr. Manster: I have it right here, Judge. The specific testimony with respect to this check is at page 881.

The Court: I will read it.

Mr. Manster: However, the testimony is that it was at Murphy's suggestion that the order for 5,000 shares, for which this check was given, was placed by Murphy with Colburn, and I think Mr. Cannon stated correctly that Mr. Tucker had no preference for any dealer through whom this transaction should be effected, and he permitted Murphy to select the dealer, and of course, Murphy was connected in this case with Collins in this particular transaction, and with this investor witness through the defendant Collins.

Mr. Cannon: There is no evidence of that. It was not proven. (Tr. 1073)

The Court: There isn't any evidence of this portion of the stock [11] delivered by Associated to Plymouth, was there, on the open market?

Mr. Manster: No, but the pertinent evidence is this. Page 876 of the transcript:

"a. Well, Mr. Murphy said there was some stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid $2\frac{1}{2}$ or $2\frac{3}{4}$, and he asked me if I had any objection to what brokerage firm he put the order in through, and I told him I did not. So, when it was confirmed that—when the sale was confirmed, I gave him the check to deliver to the brokerage firm and he picked up the stock."

The sale was effected at the suggestion of Murphy through the brokerage firm which Murphy selected. (Tr. 1074)

The Court: Well, I will deny that motion temporarily, but I will look into it.

Mr. Cannon: Exception. May it be deemed that I have made the same motion to strike Exhibit 52 upon the same grounds, it being the R. L. Colburn purchase order.

The Court: That is a part of that same transaction?

Mr. Cannon: Yes.

The Court: The motion will be denied.

Mr. Cannon: Exception.

Mr. Cannon: I move to strike the testimony, all the testimony of the witnesses Klinger and Walker, on the ground that there is, so far as defendants Collins and Morgan are concerned, and Mr. Fischgrund and Mr. Schirm on the ground that the testimony is altogether hearsay as to them, it not appearing they had any connection with the transaction at all and were not present at conversations (Tr. 1075) had or representations made at any of these conversations, [12] and if that motion may be deemed to be made without referring to the book and page of the transcript, because I don't have the transcript, and I can't do it.

The Court: That motion will be denied.

Mr. Cannon: Exception. I move to strike the testimony, all the testimony of the witness Tucker on the ground that it is hearsay as to all of the defendants and no proper or any foundation was made for the introduction in evidence of that testimony, and it is immaterial so far as this case is concerned as it affects the defendants.

I call particular attention to the fact that Mr. Tucker testified specifically that he met Collins after he bought all his stock, and therefore it could have no probative value in the establishing of the scheme or the continuance thereof.

The Court: That motion will be denied.

Mr. Cannon: Exception. I will move on behalf of all defendants to strike the testimony of the witness Shomate on the ground that so far as all defendants are concerned, that it embraces the transaction, has to do with the transaction which is in no way mentioned in the indictment. There is no

charge in this indictment to the effect that we would assume to convey property to which there was no title to any of the persons. (Tr. 1076)

I assume the only purpose of the testimony of Mr. Shomate was interrogation of the witness by the prosecution, indicating that he was directed toward establishing the lack of record titles in Gordon at the time he made the Millener lease, and that not having charged the defendants in the indictment whatever, it becomes immaterial and irrelevant. It has no bearing on the issues in this case and is highly prejudicial.

I make that motion on behalf of all defendants for that reason, and I make it further on behalf of all defendants except [13] Gordon, on the ground that the transaction is entirely hearsay, and as to the rest of the defendants, it is also highly prejudicial.

In view of the fact that I don't want this Court or the Appellate Court to feel that I haven't called to the Court's attention the details of the transaction, if your Honor wants me to refresh your recollection as to the testimony, I will be glad to do that.

The Court: It was the testimony of the County Recorder, wasn't it?

Mr. Cannon: Yes, the County Recorder. He testified on the afternoon of July 13.

The Court: I will reserve my ruling on that. (Tr. 1077)

* * *

The Court: The motions submitted to the Court

yesterday are denied. That includes the motion to strike the testimony by Mr. Shomate.

Mr. Cannon: May we have an exception to them? Also I understand, just so the record will be clear, that the motions were also directed to the dismissal of each and every count separately, and to the indictment as a whole?

The Court: Yes, that would be included. (Tr. 1163)

Each and all of the foregoing Assignments are made by Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, jointly and severally, as to each of said Assignments, and as to each of said defendants.

Wherefore, the said defendants, Sidney Fischgrund, James H. Collins and Christopher E. Schirm, by reason of the errors aforesaid, jointly and severally pray that the judgment and the sentences against and upon them may be reversed and held for naught.

SIDNEY FISCHGRUND,
JAMES H. COLLINS,
CHRISTOPHER E. SCHIRM.
CANNON & CALLISTER.

By DAVID H. CANNON.
BEN L. BLUE,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 9, 1944. [14]

No. 11037.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND, and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

OPENING BRIEF OF APPELLANTS.

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No. 11037.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND, and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANTS.

Statement of the Case.

The Indictment in this case was filed in the Central Division of the United States District Court for the Southern District of California on February 4, 1942, and named as defendants James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm. It charged all of the defendants with the violation of the Securities Act of 1933 as amended — Section 17(a)(1), Securities Act of 1933 (15 U. S. C. Section 77q(a)(1)), and with violations of the Mail Fraud Statute — Section 215 of the Criminal Code (18 U. S. C. 338), and with conspiracy to violate the Securities Act and the Mail Fraud Statute (18 U. S. C. 88).

The case was called for trial before the court and a jury beginning July 5, 1944. The defendants Fred V. Gordon and John H. Morgan were acquitted on all counts and the defendants James H. Collins, Sidney Fischgrund and Christopher E. Schirm (hereinafter referred to as appellants) were acquitted on all counts except the Conspiracy Count (Count Eleven) upon which Eleventh Count they were found guilty [Tr. R. 90, 91, and 92].

Motions for arrest of judgment [Tr. R. 96], *Motions for a new trial* [Tr. R. 94], and *motion to vacate the judgment of conviction and to discharge the defendants notwithstanding the verdict* [Tr. R. 92] were filed by the appellants and each of said motions was denied and exception allowed [Tr. R. 97]. Thereafter the trial court "ordered and adjudged that the imposition of sentence is suspended one year" [Tr. R. 98, 99, 100].

Thereupon these appellants filed their notices of appeal [Tr. R. 101, 102, 104]. The appeal was perfected before the Ninth Circuit Court of Appeals.

A motion was there made to dismiss the appeals, in short, upon the ground that no sentence had been passed and the appeals were therefore premature. This first appeal was docketed in the Ninth Circuit Court as No. 10846. The cause was remanded to the lower court for further proceedings and thereupon the United States District Court for the Southern District of California, Central Division, Hon. Paul J. McCormick, Judge presiding, imposed judgment and commitment as to each

appellant committing each appellant "to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year in a Federal jail, said term of imprisonment to be suspended for a period of two (2) years, and said defendant is placed on probation for said period of time . . ." [Tr. R. 118, 119, 121].

Notices of appeal were thereupon served and filed by each of the appellants [Tr. R. 122, 123 and 125].

Under a stipulation of the parties, the court then made an order [Tr. R. 126] "that the Assignments of Errors, Bill of Exceptions, and Clerk's Transcript heretofore certified by the clerk of the above entitled court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the latter court's No. 10846, may be adopted by reference as Assignments of Errors, Bill of Exceptions and Clerk's Transcript in connection with the notices of appeal filed with this court by said appellants on April 13 and 14, 1945."

Statement of the Facts.

Union Associated Mines Company was a Utah corporation with its principal office at Salt Lake City. The Indictment charged that beginning about June 1, 1938, and continuing to about December 1, 1939, the defendants devised a scheme and artifice to defraud various persons who might be induced to purchase stock of Union Associated Mines Company. As part of the scheme it was alleged that the defendants would incorporate Plymouth Oil Company in California, of which the defendants Gordon and Fischgrund would be president and vice-president, respectively, and one Guy B. Davis would be secretary-treasurer. It was charged that under the scheme the defendants would purchase shares of stock of Union Associated Mines Company at prices of $\frac{1}{4}$ of a cent to $\frac{1}{2}$ cent a share; that defendants would cause an agreement to be made between Plymouth Oil Company and Union Associated Mines Company under which Plymouth Oil Company would convey to the Union Associated Mines Company a certain interest in the production of two oil wells in return for certain shares of stock of Union Associated Mines Company; that the defendants would engage in creating a false market on Union Associated Mines Company stock and that certain false representations would be made as to the persons who owned interests in the Plymouth Oil Company and as to the production of the wells drilled by the Plymouth Oil Company, etc. These representations were alleged to be false and it is asserted that the mails were used in furtherance of a scheme to defraud and in the sale of securities.

The Eleventh Count charged a conspiracy to do the things referred to in the First Count of the Indictment.

Brief Statement of the Questions Involved.

Briefly stated, the questions involved in this appeal may be resolved into nine points, viz.:

POINT I. Error in denying motions to quash.

POINT II. Error in denying appellants' motions to dismiss made prior to the time when the case was called for trial.

POINT III. Error in denying the motions to dismiss on the grounds of insufficiency of the evidence.

POINT IV. Error in denying motions for arrest of judgment and to vacate judgments of conviction notwithstanding the verdicts.

POINT V. Errors in admitting in evidence minutes of Union Associated Mines Company.

POINT VI. Error in admitting in evidence the testimony from the witness Harold V. Dodd.

POINT VII. Error in admitting in evidence the testimony of Paul Julian Howard as to assessed value of certain land.

POINT VIII. Error in admitting in evidence the testimony of Frank L. Tucker and Frank Veloz, and in refusing to strike such testimony.

POINT IX. Error in denying motion to strike certain documentary evidence and oral testimony introduced through witnesses Mathilda M. Klinger and others.

POINT I.

Error in Denying Appellants' Motions to Quash Indictment Herein Upon Each and All of the Grounds Set Out in Said Motions.

Under this heading we purpose to discuss the assignment of Error I [Supp. Tr. p. 601] reading as follows:

"I.

"The District Court erred in denying Appellants' motions to quash the indictment herein upon each and all of the grounds set out in said motions to quash and requiring them to plead to the said indictment."

The record in this case as to the proceedings before the Grand Jury shows that the indictment herein was returned on February 4, 1942; that on the same day, a new Grand Jury was impaneled; that on the same day seventeen separate indictments were returned; that the indictment herein consists of thirty-two typewritten pages, and the defendants herein are charged with ten substantive counts of violation of the Mail Fraud Statute and the violation of the Security and Exchange Act, and one count of conspiracy to violate both Statutes. The indictment charged, among other things, that the defendants conspired to commit fraudulent stock manipulations, rigging of the stock market, technical inter-corporate transactions, information in reference to oil production and representations made thereof, and other matters of like scope. It is a physical and practical impossibility that sufficient competent evidence could possibly have been offered before the Grand Jury so that an indictment could properly be considered. The Grand Jury returned seventeen indictments on the same day, and it being a new

Grand Jury, the courts exercising the judicial knowledge that they have acquired during their years of practice and on the bench, must recognize the physical impossibility of the Grand Jury hearing any competent evidence justifying the return of the indictment, and we must recognize the fact that the Grand Jury must have returned the indictment purely on the hearsay statement of a government investigator [Tr. R. pp. 39-48].

An indictment will be quashed where there was no evidence whatever, or no competent evidence, of the offense charged, presented to the Grand Jury.

Brady v. United States, 24 F. (2d) 405.

The law is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolably, however crushing may be the pressure of incriminating proof.

Snyder v. Mass. 291 U. S. 97, at p. 22.

In the 8th Circuit Court of Appeals, it is the settled rule that an indictment will be quashed where there was either no evidence whatever or no competent evidence of the offense charged, presented to the Grand Jury.

Nanfito v. United States, (C. C. A. 8th) 20 F. (2d) 376, 378;

Murdick v. United States, (C. C. A. 8th) 15 F. (2d) 965, 967;

Anderson v. United States, (C. C. A. 8th), 273 Fed. 20, 29;

McKinney v. United States, (C. C. A. 8th) 117 C. C. A. 403, 199 Fed. 25, 33.

We think the same rule should be applied where a grand jury returns an indictment without any evidence whatever before it of a separate distinct, and essential element of the offense, such as the use of the mails.

People v. Price, 6 N. Y. Crim. Rep. 141, 2 N. Y. Supp. 416, *id.* 119 N. Y. 650, 23 N. E. 1149;

People v. Fishman, 118 Misc. 738, 194 N. Y. Supp. 887.

In *People v. Price*, *supra*, the Court among other things, said:

“The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted.”

What transpired before the grand jury may be shown, no matter by whom, whenever it becomes essential to protect the individual rights of the accused, who has the constitutional right to insist that the indictment against him be based upon sufficient and competent legal proof.

United States v. Silverthorne, 265 Fed. 853, 855.

In *United States v. Rubin*, 218 Fed. 246, the indictment was quashed on the ground that it appeared that the main witnesses had no personal knowledge of the facts to which they testified, they merely giving information as they obtained it by investigations.

It goes without argument that an indictment must be based on competent evidence. Parties should not be indicted on mere hearsay or other incompetent evidence but the mere fact that there may have been improper evidence before the grand jury is not sufficient to vitiate an in-

dictment if there was any competent evidence upon which such indictment might be found. If it effectively appears in some manner that there was no competent evidence before the grand jury on which to base an indictment, and that question is seasonably and properly raised, the Court should of course take proper action thereon.

Murdick v. United States, 15 F. (2d) 965, 967.

Judge Kenyon, in the *Murdick* case, further said, on page 968:

“There is no divinity surrounding grand jury proceedings, and the Court has the right to go behind the secrecy imposed upon a grand jury as to its proceedings, where the interests of justice demand it.”

He further states:

“If defendants can show that an indictment was returned against them entirely on incompetent evidence, they can present the matter by motion to quash.”

In *United States v. Swift*, 186 Fed. Rep. 1002, the Court states:

“The cases are uniform to the effect that, except in those States in which by statute indictments are required to be returned on ‘legal’ or ‘competent’ evidence, the courts will not review the evidence received by the grand jury for the purpose of passing upon its competency.”

The State of California, in Section 919 of its Penal Code, states particularly, among other things, the following:

“The Grand Jury can receive none but legal evidence and the best evidence in degree to the exclusion of hearsay or secondary evidence.”

The case of *Greenberg v. Superior Court*, 19 Cal. (2d) 319, at page 321 of said Reports, states as follows:

“A grand jury is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence. * * * A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and the laws of the State of California, and encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty. * * * Such an indictment is void and confers no jurisdiction upon a court to try a person for the offense charged.”

Hearsay evidence is incompetent and therefore is no evidence at all. As long as the grand jury is utilized, it must function properly. If it does not function properly, and if it returns an indictment against an individual without observing the laws and rules of evidence, and returns an indictment on the ex-parte statements of an investigator for the Securities and Exchange Commission, the Constitutional rights of the defendant are violated because there is no due process.

The State of California, recognizing the constitutional rights and presumptions that a defendant in a criminal case is entitled to, requires that evidence receivable before a Grand Jury must be none but legal evidence and the best evidence in degree to the exclusion of hearsay or secondary evidence. (Sec. 919, Penal Code, State of California.) [Tr. R. 39-48.]

The new rules of criminal procedure for the District Courts of the United States (House Document #12,

letter from the Attorney General of January 3, 1945, Rule 6(e), page 7) reads in part, as follows:

“A juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to, or in connection with, a judicial proceeding, or when permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictments because of matters occurring before the Grand Jury.”

The foregoing is evidence of the fact that a Judge may, if grounds are sufficient, allow the proceedings before the Grand Jury to be examined into. We will assume that it being a matter for a Judge to determine, it is a matter of judicial discretion. In the instant case, the refusal of the Judge to permit the defendants to examine into the minutes of the Grand Jury on the *prima facie* showing made, is an indication of an abuse of discretion.

“Judicial discretion” is substantially synonymous with judicial power. The term “discretion” is an impartial discretion guided and controlled in its exercise by fixed, legal principles; a legal discretion to be exercised in conformity with the spirit of the law and in the manner to subserve and not to defeat the ends of substantial justice. (*Griffin v. State*, 88 S. E. 1080.)

It seems far more important, to safe-guard the liberty of a citizen, that the basic formula through which a man is accused of crime should be a formula premised on a solid foundation of legal evidence properly adduced. If a motion lies by a defendant to quash an indictment, if the pleading is not proper, or if the return is insufficient, then surely that same right should be more properly given

to a defendant when the original proceedings are not legally complied with.

An indictment returned on no evidence (the evidence herein being incompetent and therefore being no evidence at all) upon which a defendant would be required to stand trial, should be quashed upon proper showing made by reason that a requirement to go to trial on an indictment illegally or wrongfully returned would be depriving the defendant of the constitutional rights given him under the due process clause under Amendment 5 of the Constitution.

To require the defendant to go to trial on charges set forth in an indictment illegally or wrongfully obtained would be a violation of the defendant's constitutional rights under Amendment 6 of the Constitution.

POINT II.

Error in Denying Appellants' Motions to Dismiss Said Indictment Made Prior to the Time When Said Cause Was Called for Trial.

Under this heading we purpose to discuss the assignment of Errors II and III [Supp. Tr. R. p. 602] reading as follows:

"II.

"Said District Court erred in denying appellants' motions for an early trial of said cause.

III.

"Said District Court erred in denying appellants' motions to dismiss said indictment made prior to the time when said cause was called for trial."

The grounds of said motions were, and the grounds of said error in denying said motions were and are those set out in said motions to dismiss [see Tr. R. pp. 49-90].

These defendants were indicted on February 4, 1942. The indictment charges that the defendants, commencing in 1938 and ending in 1939, committed the acts set forth. The case was set for trial on June 4, 1942, at which time all of the defendants were present in person, and represented by their attorneys ready for trial. At that time, in an open court, H. V. Calverley, Assistant U. S. Attorney, appearing as counsel for the Government, addressed the Court, and stated that he had written for authority from the Attorney General, to dismiss the case by reason of the fact that his examination of the files, records and statements, convinced him that there was not sufficient evidence to convict, and that justice would be served by a dismissal. The Court thereupon continued the case for the term for setting. Thereafter the cause was continued from term to term—from September, 1942, until February, 1944, on which date the February term calendar was called, and the case was set for trial for April 18, 1944, and on March 13, 1944, on the Court's own motion, it was ordered that an Order setting the cause for trial for April 18, 1944, be vacated, and the Cause was transferred to Presiding Judge Paul J. McCormick for re-assignment. The latter motion and order was made without the appearance or consent of the defendants. Thereafter, in the court room of Judge Harry Hollzer, the matter was set for trial for July 5, 1944, and Judge Dave W. Ling of Arizona was assigned as trial Judge [Tr. R. 53-54].

A motion was made before Judge Ling to dismiss on the grounds that the constitutional rights of the defend-

ants as granted to them by Amendment 6 of the Constitution of the United States, had been denied, and that they had not enjoyed the right to a speedy trial. The motion was denied and exception was noted [Tr. R. pp. 49-90].

Amendment Six of the Constitution of the United States reads as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *”

The wording of the Sixth Amendment is clear and explicit. The question is, what is a speedy trial. Congress has not in its legislative actions set forth a definite time limitation, so the question of what constitutes a speedy trial must be determined by what is reasonable and by precepts of example and by what other legislative bodies have determined constitute a time limit within which to bring defendants to trial.

The legislature of the states of California and Arizona have determined that unless a defendant is brought to trial within sixty days after an indictment or information has been found, that the defendant must be dismissed.

In the case of *Harris v. Municipal Court*, 209 Cal. 55, the Court says:

“Section 13 of article I of the Constitution of California provides in part as follows: ‘In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial.’ This provision of the Constitution is self-executing. (*In re Alpine*, 203 Cal. 731 (58 A. L. R. 1500, 265 Pac. 828); *In re Begerow*, 133 Cal. 349 (85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828.)) It reflects the letter and spirit of the following provision of the federal Constitution to the same effect: ‘In all

criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ' (U. S. Const., art. VI, sec. 1.) This is a fundamental right granted to the accused and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act. (*In re Begerow*, *supra*.) The policy of the law in this respect has been further declared by the legislature and by constitutional amendment in this state. * * *

" . . . It will thus be seen that the time within which criminal cases should be disposed of has been and is a matter of great public concern, and the duty is imposed upon courts, judicial officers and public prosecutors, to expedite the disposition thereof.

What is a 'speedy trial,' as those words are used in the Constitution? The legislature in section 1382 of the Penal Code has declared that unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the prosecution. Thus the legislature by necessary inference has said that a trial delayed more than sixty days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision."

It is true that there are several United States Circuit Court cases, particularly the case of *Phillips v. United States*, 201 Fed. 259, and *Worthington v. United States*, 1 F. (2d) 154, which hold that in order for a defendant to avail himself of the right given under Amendment VI, that it is incumbent upon him to demand a trial and if he does not do so, that then he waives the right. That theory does not apply in the present cause.

In this case, these defendants appeared in Court ready for trial two years and one month prior to the trial date, at which time the Assistant United States District Attorney stated in open court that there was not sufficient evidence to convict and moved for a dismissal subject to the rule of the office to receiving permission from the Attorney-General in Washington. By his statement to the Court, the defendants were lulled to a point of inactivity. The assumption was natural that the consent of the Attorney-General in view of the recommendation of his representative, was unquestioned.

The situation that the defendant Collins found himself in is a glaring example of what was a natural sequence of the statement of the District Attorney. The fact that since the motion was made, witnesses necessary for the proper defense of the case were in the Army and unavailable as witnesses, is another natural sequence of the delay in the case. We must face the actual fact that the memories of man are frail and that the facts attempted to be adduced in this particular cause are facts that took place in 1938, commencing about the month of August, and continuing until about March or April of 1939. Either the witnesses will have forgotten conversation or their memories will concoct imaginative facts in line with what they thought happened but what most likely did not happen.

The right to a speedy trial as that right is granted under the Constitution, was given because Congress and the people recognized that an accusation of crime is serious; that it affects the reputation of the man accused; that it should be speedily disposed of so that if an innocent man is charged with a crime, he may be exculpated promptly and not be questioned by reason of the indict-

ment or charge. It was also included as a constitutional amendment by reason of the fact that it was recognized that unless a man was tried with reasonable diligence as far as time was concerned, that witnesses would forget the facts surrounding the matter; that witnesses would be unavailable or could not be located; that witnesses might die.

In the case of *United States ex rel. Whitaker v. Henning*, 15 F. (2d) 760, the Court, in considering whether mandamus would apply requiring the trial of a man who at the time of the petition was incarcerated in the federal penitentiary, states on page 761:

“The reason for the majority rule is well stated in *State v. Keefe*, 17 Wyo. 227, 98 P. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161: ‘The right of a speedy trial is granted by the Constitution to every accused. A convict is not excepted. He is not only amenable to the law, but is under its protection as well. No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect inflict upon him an additional punishment for the offense of which he has been convicted. At the time of defendant’s trial upon the one information, he was under the protection of the guaranty of a speedy trial as to the other. It cannot be reasonably maintained, we think, that the guaranty became lost to him upon his conviction and sentence, or his removal to the penitentiary. Possibly in his case, as well as in the case of other convicts, a trial might be longer delayed, in the absence of a statute controlling the question, than in the case of one held in jail merely to await trial, without violating the constitutional right, for an acquittal would not necessarily terminate imprisonment. However, the purpose of the provision against an unreasonable delay

in trial is not solely a release from imprisonment in the event of acquittal, but also a release from the harrassment of a criminal prosecution and the anxiety attending the same; and hence an accused admitted to bail is protected as well as one in prison. Moreover, a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that defendant is serving a sentence in the penitentiary for another crime." See, also, *Frankel v. Woodrough* (C. C. A.) 7 F. (2d) 796, and the cases there cited."

A speedy trial is one had as soon after indictment as the prosecution can with reasonable diligence prepare for it, regard being had to the terms of court; a trial conducted according to fixed rules, regulations and proceedings of law free from vexatious, capricious and oppressive delays.

22 *Corpus Juris Secundum* 716;

People v. Molinari, 67 Pac. (2d) 767 (Cal.);

State v. Carrillo, 16 Pac. (2d) 965, 41 Ariz. 170;

Von Feldstein v. State, 17 Ariz. 245, 150 Pac. 235.

It is our contention that it is not the duty of the defendants to ask that the case be tried as is held in the *Phillips* case. When a defendant is charged with a crime by indictment, it is incumbent upon the government to follow the letter and spirit of the law. It is not incumbent upon the defendant to point out to the government its failure to comply with the spirit and letter of the law, as well as the explicit wording of the Constitution. The onus is on the government, not on the defendants. If it were otherwise, an indictment could be pending against a man for a lifetime.

Enlarging upon the above thought, the Court states in *State v. Carrillo*, 41 Ariz. 170, as follows:

“ . . . As we read the law, defendant is not required to request a trial. He is not the moving party. It is the state that initiates the accusation, and any delay in its prosecution, except for most cogent reasons, is not contemplated or justifiable. If the state can excuse itself for not bringing the accused to trial, then the onus for celerity is shifted to the accused. There is no intimation in the law that the accused must request a trial before he may claim the right to be dismissed for failure on the part of the state to bring on the prosecution within the limit fixed by law. If the trial is postponed for any reason other than some cause attributable to the accused, in the absence of a showing of good cause for the postponement, it must be dismissed.”

When an established procedure is departed from, it may, as in the instant case, lead to the impairment of substantial rights of the defendants. All substantial rights belonging to defendants should be respected. If a substantial right of a defendant is not respected, the same procedure applied to all men placed in the same position would illegally deprive defendants of life and liberty. It is necessary for the protection of all men that we do not have one procedure for one defendant and another procedure for another defendant. To say that in one case defendants may not be brought to trial for years after an indictment has been found and in another case to have a judge require the defendant to go to trial within one week after an indictment is found, is not proper procedure.

Based on the facts as shown in this case, and if this procedure were to be permitted, a court would have little defense if an attorney were to say, “I wish continuance

after continuance for term after term by reason of the fact that it was done in a case titled, *United States v. Collins, et al.*” If the government can act as it does in the instant case, it can act that way in every case.

We believe that particularly appropriate statement found in the late case of *People v. Rodriguez*, 58 Cal. App. (2d) 424, 425:

“We find particularly appropriate in this connection remarks of former Chief Justice Bleckley of the Supreme Court of Georgia, delivered to the Georgia Bar Association and printed in its annual report (1886) as follows: ‘Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a court to stray from justice of procedure in order to administer justice of substance.’”

POINT III.

Error in Denying Motions Made by Appellants to Dismiss on the Grounds of Insufficiency of the Evidence to Justify a Conviction.

Under this heading we purpose to discuss the assignment of Errors IV and V [Supp. Tr. pp. 602, 603] reading as follows:

“IV.

“Said District Court erred in denying the motions made by them at the close of the plaintiff’s case in chief to acquit them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, on each and all of the counts in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is, insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, to answer any of the counts in said indictment.

V.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss each and every count of the said indictment, and to acquit them on each and every count in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them,

the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, and would not and does not tend to prove that the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm are guilty in any manner or form as charged in said indictment or any count thereof.”

Upon the conclusion of the Government’s case, a motion was made on behalf of all of the defendants for a directed verdict and for a dismissal of each and every defendant on the grounds that the evidence as adduced by the Government was not sufficient under the indictment to present any question to the jury [Tr. R. 491, 499], and said motions were denied and exceptions noted [Tr. R. 499-500.]

Upon the conclusion of the taking of evidence the motion was again renewed as to all the defendants and as to each and all of the counts of the indictment, which motions were again denied by the Court and exceptions taken [Tr. R. 584-585].

The defendants having been acquitted on all counts of the indictment except the conspiracy count, causes us to look into the record to see what, if any, evidence of a conspiracy among these defendants was adduced justifying their conviction.

Stripped of legal verbiage, the facts in the case are as follows: On August 19, 1938, the Plymouth Oil Company was incorporated under the laws of the State of California, with the original Directors, Fred V. Gordon, Sidney Fischgrund and Guy V. Davis [Tr. R. 382-386]. An aggregate of \$100 par value of its capital stock was authorized to be issued to the Directors named in the Articles of Incorporation by the Division of Corporations

of the State of California on September 19, 1938, which shares were required to be escrowed, and which shares were deposited with R. A. Dunnigan as escrow holder, approved by the Division of Corporations [Tr. R. 379-381]. During the month of August, 1938, there was an oil boom in the Torrance District in Los Angeles County, and the Plymouth Oil Company acquired certain leases in the immediate vicinity of 237th Street, between Narbonne and Eshelman, in the Torrance field.

Christopher E. Schirm, who was in the oil business in Los Angeles at that time, knew John H. Morgan who was an attorney in Salt Lake City, Utah, and during the month of August, 1938, there was correspondence between Mr. Schirm and Mr. Morgan in reference to the possibilities of making money through the acquisition of an oil lease in Torrance, and drilling for oil [Tr. R. 214-223]. The Union Associated Mines Company was a Utah Corporation, which at one time had been listed on the Salt Lake City Stock Exchange, but had been inactive; and which Company had levied a total of eight assessments upon its stock between 1931 and 1935 [Tr. R. 135]. The Union Associated Mines Company owned certain mining claims in what was known as the "Cottonwood District" in Utah, but no work had been done on the claims for many years. The Union Associated Mines Company had been suspended in Utah for non-payment of franchise fees and tax [Tr. R. 134] and was delisted on the Salt Lake Exchange Dec. 18, 1936 [Tr. R. 202]. As of December 31, 1937, the Union Associated Mines Company had outstanding 789,229 shares [Tr. R. 200].

E. Byron Siens who was dead at the time that the indictment was returned, negotiated on behalf of the

Plymouth Oil Company with the Union Associated Mines Company, and a transaction was completed whereby on September 21, 1938, the Union Associated Mines Company, in exchange for 635,000 of its shares, received from the Plymouth Oil Company a 50% gross overriding royalty on the well proposed to be drilled by the Plymouth Oil Company in the Torrance field. In addition to receiving the 50% gross overriding royalty, the Union Associated Mines Company received 25% of Plymouth Oil Company's interest in certain oil and gas leases and agreements, covering twelve parcels of land in property located in Los Angeles County [Tr. R. 251-256]. The Plymouth Oil Company in the said agreement, agreed to drill an oil well to a depth of approximately 5000 feet, and no costs of any kind or nature were to be assessed against the Union Associated Mines Company. The well was drilled by the Plymouth Oil Company at a cost to it of approximately \$40,000, and the well came in a producer on December 14, 1938 [Tr. R. 554]. The initial production was estimated from 225 to 250 barrels by the Superintendent of drilling, Guy V. Davis, and he so told the members of the Plymouth Oil Company [Tr. R. 555]. The gross number of barrels produced from the well from December 14, 1938, to December 31, 1938, was 2045.4 barrels, and Mr. Davis notified the Union Associated Mines Company as to the total.

John J. Wents, Jr., who qualified as an appraiser of oil properties, testified that a 1% overriding interest with nothing deducted for the cost of operation in the neighborhood wherein the well was drilled, was worth about \$1200.00, if the well was a contemplated well or a well which was drilling. If the original production of the

well was 124 barrels per day and at the end of the month of December, 1938, production was approximately 100 barrels per day, the value of a 1% overriding interest was \$1400.00 [Tr. R. 516].

There were about 55 or 60 wells drilled in the immediate vicinity of 237th Street and Eshelman, Torrance, in 1938 and 1939. Based on the figures of Mr. Wents, the 635,000 shares of stock given to Plymouth Oil Company by Union Associated Mines Company in exchange for the 50% gross overriding interest on Mr. Wents' statement would be of the value of about 10¢ per share while the well was being drilled, and would be worth about 11¢ per share when the well came in.

The defendants' fraud, as alleged in the indictment, is that the stock was selling at an inflated value when it was sold up to 5¢ per share.

A subsequent contract between Plymouth and Union was entered into on January 5, 1939, wherein Plymouth assigned to Union a 40% participating interest in a second well in the same vicinity in exchange for 635,000 additional shares of Union's capital stock. Mr. Wents' testimony is that such interests would be worth about \$800.00 a per cent. These contracts were negotiated on behalf of Plymouth Oil Company by E. Byron Siens, and on behalf of Union Associated Mines Company by their officers duly authorized to sign these agreements. These contracts were drawn by Sidney Fischgrund and Richard Dunnigan as attorneys for the Plymouth Oil Company [Tr. R. 257-264].

The original 635,000 shares were issued in the name of Chris Schirm, in one certificate, dated September 21, 1938. This certificate was later returned and thereafter

re-issued into smaller denominations on September 27th and 28th, 1938, and totalled 635,000 shares in the name of Chris Schirm. A second issuance of 635,000 shares was made on February 25, 1939, and was in the name of the Plymouth Oil Company, for the interest in Plymouth well #2. This certificate was never re-issued and was left in that denomination [Tr. R. 195]. Chris Schirm was the nominee of the Plymouth Oil Company, and the stock was issued in his name for convenience only [Tr. R. 539]. There is not one bit of evidence showing that Mr. Schirm received one penny or one share as consideration for anything that he had to do with the transaction. Mr. Schirm severed his connection with the deal in the latter part of 1938, and according to the evidence, had nothing further to do with it [Tr. R. 184-185]. There is no evidence that Mr. Schirm and the defendant Collins knew each other, or had ever met.

Sidney Fischgrund is a young lawyer who prepared the Articles of Incorporation of the Plymouth Oil Company, and thereafter acted in the capacity of Vice-President and Attorney for the Company. He had had no previous experience in oil matters, except that he and his mother owned a lot in Wilmington, California, which was producing some oil. He never received any money from the Plymouth Oil Company or the Union Associated Mines Company [Tr. R. 530]. He, himself, purchased stock in the Union Associated Mines Company to the extent of \$500.00 [Tr. R. 549]. He bought the stock because he felt that he was making a good buy on the market. Mr. Fischgrund also prepared the contract between James H. Collins and E. Byron Siens; and Mr. Fischgrund owned four-tenths of the capital stock of

the Plymouth Oil Company and was interested in seeing that it was a success [Tr. R. 532-533]. Mr. Fischgrund drew other contracts, but outside of acting as attorney for the Company, he had no actual participation in any sales made of Union Associated Mines Company stock, except the actual *bona fide* purchases of stock which he made for himself and his family and which he still retains today.

James H. Collins was a stock salesman who entered into a written agreement on January 17, 1939, with E. Byron Siens, wherein Collins agreed to purchase one million shares of Union Associated Mines Company stock on a sliding scale, at prices ranging from $2\frac{1}{2}\text{¢}$ per share to 30¢ per share. The stock was to be taken up monthly, commencing February 1, 1939, to the amount of 83,333 shares per month [Tr. R. 284-289]. Collins sold a portion of the stock that he had contracted to purchase to John McEvoy, another stock salesman, who paid Collins the same price that the stock cost Collins. McEvoy would then make a profit by selling out at an increased price to various investors. McEvoy sold stock to five of the individuals set out in the substantive counts of Mail Fraud. Collins sold for a couple of months and then withdrew from the deal, and subsequently filed a civil action against the Plymouth Oil Company arising out of the contract of January 17, 1939 [Tr. R. 301].

The two wells in which Union Associated Mines Company was interested, greatly declined in production, to the point where the return was very small.

The Union Associated Mines Company on August 1, 1939, declared a dividend payable August 30, 1939, of \$1.00 per 1000 shares on the issued and outstanding stock of record, except the 635,000 shares delivered

to the Plymouth Oil Company on Well #2 which 635,000 shares were delivered ex-dividend as per contract between the two companies. Up to August 1, 1939, Union Associated Mines Company had received as income from the proceeds of Plymouth Well #1, the sum of \$4115.22. [Ex. #5 in evidence.] No one of the three defendants had anything to do with a declaration of the dividend or the disbursement of the income of Union Associated Mines Company. There were collateral matters brought out in evidence which in no way changes the picture above set forth as to the activities of the three defendants who stand convicted of conspiracy.

In practically all cases involving violations of the Mail Fraud Statute and the Security and Exchange Act, where there is a multiplicity of defendants, defendants are usually segregated into two groups; one group is usually designated by counsel and the Court as "main" defendants; the other group is usually designated as "minor" defendants. It is strange but true that in the instant case, the main defendants, Fred V. Gordon and John H. Morgan were acquitted. The minor defendants were convicted. It is also strange but true that if there was a conspiracy, and we can see not one scintilla of evidence to that effect, that J. A. Barclay, President of the Salt Lake City Stock Exchange, and E. Byron Siens, who bent the laboring oars, are both dead. It is also strange to note that Arthur P. Adkisson and Guy V. Davis, both of whom were named as co-conspirators were

not indicted, and the evidence shows that A. P. Adkisson was the man who went to Salt Lake City and placed progressive bids for the stock. There is no showing that he had any discussion of any kind with any of the three defendants convicted. Mr. Adkisson, a prosecution witness, stated that the market was not rigged [Tr. R. 187]. Mr. Adkisson, during the time that he dealt with brokers only, made one purchase of stock and that was for the gross amount of \$150.00 and consisted of 10,000 shares at $1\frac{1}{2}\text{¢}$ per share [Tr. R. 187].

Guy V. Davis was in charge of drilling operations, and all information regarding the progress and production of the wells drilled by Plymouth Oil Company came from him. No one of the three defendants convicted had anything whatsoever to do with the drilling of the wells, the production of the wells, nor was there any showing that they had any access to information except from Mr. Davis and Mr. Siens, and there is no evidence that they had any reason to disbelieve any statements made to them. There is no evidence that they planned to do any illegal acts. The jury, in acquitting Fred V. Gordon and John H. Morgan, stated in substance that either there was no scheme to defraud, or if there was a scheme to defraud, the defendants acquitted were not consciously part of the scheme.

If the jury found this to be true of H. V. Gordon and John H. Morgan, how much truer it would be in the cases of James H. Collins, Sidney Fischgrund and Christopher Schirm. The verdicts are inconsistent.

The Law.

No person can be convicted of using the mails to defraud unless it be shown, beyond a reasonable doubt, that he, *knowingly*, devised a scheme to defraud and that the mails were used in furtherance of it. The offense is one requiring specific intent. Without it, the offense cannot be committed. Because of this, good faith of the accused is a complete defense.

As one court has stated: "The ultimate issue of fact was whether defendants were actuated by an intent to defraud when using the mails." *Sandals v. United States*, 6 Cir., 1914, 213 Fed. 569, 574. In the same opinion we find this language: "A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed impostor. If the men accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged. As Mr. Justice Brewer said in *Durland v. United States*, 161 U. S. 306, 313, 16 S. Ct. 508, 511 (40 L. Ed. 709):

"The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insists, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident Company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sus-

tained, no matter how visionary might seem the scheme.'

In *Rudd v. United States* (8 Cir.) 173 F. 912, 913, 97 C. C. A. 462, 463, the scheme to defraud and the circulars sent through the mails to promote it concerned a machine designed as an attachment to a pump for lifting water, which was shown to be contrary to well-known fundamental physical laws.' In respect of the defense of honest belief in the efficiency of the machine, Judge Hook said:

'The main defense was that, though the machine may have been impracticable, the accused honestly believed in its efficiency, and that what he did was without intent to defraud. Of course, if this was so, there was no violation of the law which was designed to prevent the use of the post office in intentional efforts to despoil.' "

See, also *Harrison v. United States*, 6 Cir., 1912, 200, Fed. 662; *Gold v. United States*, 8 Cir., 1929, 36 F. (2d) 16, 32.

To say the least, this case and particularly the convictions resulting from it, is unique. The defendants herein have been found guilty of having been part of a conspiracy to use the mails fraudulently and to violate the Security and Exchange Act. How can there be a scheme to defraud when each and every purchaser of Union Associated Mines Company stock was shown affirmatively to have received stock at a price much less than its real value? The simple arithmetic of the matter, even eliminating the expert testimony adduced, shows that 635,000 shares of hitherto worthless stock was accepted in exchange for a gross 50% overriding royalty in an oil well in a proven oil field. To drill the well cost \$40,000.

No cost of the drilling of the well was chargeable against Union Associated Mines Company. The Plymouth Oil Company therefore paid all the expenses of drilling the well, paid all of the land-owner's royalty, paid all of the operating expenses of the well after production was obtained, and retained for itself a participating interest far less than the interest assigned to the Union Associated Mines Company.

If it cost \$40,000 to drill the well, then certainly the 635,000 shares would be worth at least \$20,000.00, which is in excess of 3¢ per share, and when one takes into consideration that in addition to the cost of drilling, the Plymouth Oil Company had to pay the other expenses, the figure of \$20,000 must be raised to where an appraisal of \$1200.00 a per cent must be recognized as being a conservative appraisal. If it was worth \$1200 a per cent, it means that the Union Associated Mines Company received an asset worth \$60,000.00 or approximately 10¢ a share. Where is the fraud? How have people been deprived of their money unlawfully or by false pretense? Merely because of the fact that the hopes of the promoters were not fulfilled does not make the scheme fraudulent, and it might well be said in passing that each and every stockholder who purchased stock on the strength of the Plymouth Oil Company transaction, was offered and did receive, when it was requested, their money back, with interest at the rate of 6% [Tr. R. 163].

The government relied largely upon the testimony of Arthur P. Adkisson. The Government, by offering him

as a witness, represents him as worthy of credit. *Dravo v. Fabel*, 132 U. S. 487, 490. Mr. Adkisson testified that he never did conspire to defraud anyone [Tr. R. 177]. He testified also that "I believed the Union Associated Mines Company had made a wonderful deal," that he thought it was a good deal because it was a most unusual deal. He testified further that the Company was offered for 635,000 shares of its stock, an interest in a well that was being drilled in a proven territory and "assuming that they could get a well without any overhead at all, 50% interest in that well with a settled production of 200 barrels, the way they used to figure these things it would be worth about \$1000 a barrel for settled production. In other words, if they had a 100 barrel well with settled production, the price fixed on the well would be \$100,000.00" [Tr. R. 180]. He further testified that E. Byron Siens told him that they estimated the initial production was between 300 to 500 barrels. He further testified that Mr. Fischgrund did not tell him that and that no one told him that except Mr. Siens [Tr. R. 185].

The Government, having vouched for Mr. Adkisson, his testimony on its face shows that there was no conspiracy to defraud anyone, but that on the contrary, he and everyone else who went into the transaction, went into it in the highest of good faith, and on the assumption based on actual facts that the deal would be profitable to anyone participating.

When one takes into consideration that everything that the Plymouth Oil Company agreed to do, was done, that two wells were drilled to completion as producers, that the Union Associated Mines Company received everything that it was entitled to receive, that there was no question but that every dollar was properly accounted for, that there was no question that all information coming from the office of Union Associated Mines Company to its stockholders was true, it is hard to understand how a judgment of conviction is justified.

The crime of "conspiracy" consists in combining or confederating of two or more persons for purpose of committing a public offense. It is distinct from the offense intended to be accomplished as a result of a conspiracy, and is complete upon the forming of a criminal agreement and the performing of at least one overt act in furtherance of an unlawful design. *Weniger v. U. S.*, 47 F. (2d) 692. In other words, there must be both an unlawful agreement and an act to effect the object of it. *Ferracane v. U. S.*, 29 F. (2d) 691. Wherein, in all of the testimony adduced, is there any evidence of one single act that can properly be termed unlawful? There is no evidence of any unlawful act or intent to violate the Mail Fraud Statute, nor is there any evidence of any intention to violate the Security and Exchange Act. On the other hand, there is every evidence that whatever participation the defendants had in the transaction, was honest, and that their every act was legal.

POINT IV.

Error in Denying Motions for Arrest of Judgment and to Vacate Judgments of Conviction Notwithstanding the Verdicts.

Under this heading we purpose to discuss the Assignment of Errors VII and VIII [Supp. Tr. pp. 603, 604] reading as follows:

“VII.

“The District Court erred in denying the motions made by the said defendants after the jury had returned its verdicts in the above entitled cause, for an order arresting the judgments on Count XI in said indictment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said Count XI in said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, or against the constitution of the United States, and particularly said Count XI does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VIII.

Said District Court erred in denying their Motions to Vacate the Judgment of Conviction and Discharge the Defendants Notwithstanding the Verdicts.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that the verdicts of the jury finding them guilty as charged in Count XI of the indictment, were and are contrary to law and not supported by the law and the facts involved in these proceedings.”

The motions particularly referred to in these Assignment of Errors are as follows:

“MOTION FOR ARREST OF JUDGMENT.

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to refrain from entering a judgment against any of them based upon the verdict rendered in this case, upon the following grounds:

1. That the Eleventh Count in said indictment does not state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or any law or against the Constitution of the United States of America, and particularly said Eleventh Count does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.” [Pr. R. 96.]

“MOTION TO VACATE THE JUDGMENT OF CONVICTION AND TO DISCHARGE THE DEFENDANTS NOTWITHSTANDING THE VERDICT.

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to vacate and set aside the judgment of conviction herein and to discharge the defendants and each of them, notwithstanding the verdict.

That this motion is made upon the records and files herein and upon the transcript of the proceedings on the trial of this action and upon the exhibits offered and received herein, which transcript and exhibits are hereby referred to and relied upon by the said defendants. Said motion is made upon the following grounds and each of them:

1. That the verdict of the jury finding the said defendants and each of them guilty as charged in the Eleventh Count of the indictment herein, was and is contrary to law and not supported by the law and the facts involved in these proceedings.” [Pr. R. 92, 93.]

These appellants were acquitted on all of the substantive counts, and convicted on the conspiracy count alone. By the jury’s verdicts, Mr. Gordon and Mr. Morgan were acquitted on *all* counts, including the conspiracy count. It must be held, therefore, that whatever conspiracy existed, existed only between all or some of the following persons: Messrs. Siens, Barclay, Adkisson, Davis (none of whom was indicted), Collins, Fischgrund or Schirm.

These appellants were charged in the Eleventh Count with the conspiracy denounced under Title 18, U. S. C. Sec. 88, Sec. 37, Penal Code, which reads:

“If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such parties do any action to effect the object of the conspiracy . . .”

they shall be guilty of an offense.

The conspiracy charged here is one to

“Violate Section 17(a)(1) of Securities Act of 1933 (Section 77q(a)(1), Title 15 U. S. C.) and Section 215 of the Criminal Code of the United States (Section 338, Title 18, U. S. C.)” [Tr. R. 33.]

Obviously, in the case at bar, there can be no violation of Section 17(a)(1) of the Securities Act unless there is a “sale,” as defined in the Securities Act, of a

security “by the use of the mails,” and the employment of the device, scheme, or artifice to defraud as it is described in the indictment. This, because Section 71q(a)(1) provides, insofar as it is material here, as follows:

(a) It shall be unlawful for any person in the sale of any securities . . . by the use of the mails, directly or indirectly —

(1) To employ any device, scheme, or artifice to defraud”

It is also obvious that in this case there can be no violation of Section 215 of the Criminal Code (the Mail Fraud Statute) unless the mails were actually used “for the purpose of executing such scheme or artifice or attempting so to do.” It is clear, therefore, that before any of these appellants could properly be found guilty of conspiracy, to violate those statutes, it must be shown that such appellant knowingly joined a conspiracy formed for the specific purpose of utilizing the mails either in violation of the Securities Act, or in violation of the Mail Fraud Statute, or both. It is not sufficient to show that a scheme to defraud was formed and that mails were in fact *later* used to carry it into effect or to make a sale of securities; it must be specifically alleged and proven that in joining the conspiracy, the particular appellant actually *intended* to violate those laws *by the actual use of the mails*. This is very clear.

In *Farmer v. U. S.* (C. C. A. 2), 223 Fed. 903, it is said:

“Count 1 charged a conspiracy (section 37) to commit a violation of that section (215). Under the first count, therefore, the government had to sustain a heavier burden of proof as to the *intent* of the conspirators than under the other two. Under 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under section 5480, U. S. Rev. Stat. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless if, in carrying it out, he does use the mails, the offense is committed . . . *When, however, the charge is conspiracy to commit the offense specified in section 215, it is necessary to prove an intent, not only to defraud, but also to defraud by the use of the mails.*” (Emphasis supplied.)

See also: *Burns v. United States*, (C. C. A. 8), 279 Fed. 982.

In *Morris v. United States* (C. C. A. 8), 7 F. (2d) 785, the court had under consideration an indictment containing 18 counts charging violations of Section 215, and one count charging conspiracy to violate the Mail Fraud Statute. The court said:

“Where the charge, however, is conspiracy under section 37 of the Criminal Code to violate section 215, *the intended use of the mails is a substantial element of the offense.* A conviction cannot be sustained without proof of the same . . . The govern-

ment carries a heavier burden where it seeks a conviction under section 37 for a conspiracy to violate section 215 than where it seeks merely conviction for the violation of said section 215 because it must prove an intent on the part of the conspirator to use the mails in carrying out the scheme." (Emphasis supplied.)

With these principles of law — now very well established — in mind, let us consider the allegations of this particular Indictment. The "scheme and artifice" was described in substance in the first count of the Indictment. It is nowhere alleged in that first count that such "scheme and artifice" contemplated the use of the mails. It is true that the Indictment alleges that —

"It was further a part of said scheme and artifice that the defendants would print, edit and prepare and cause to be printed, edited and prepared, bulletins, circulars, letters, notices, and other literature, all of which would contain false and misleading statements as hereinbelow described, and which would be disseminated and transmitted to the persons to be defrauded and to the public generally *by the defendants, their agents and employees, . . .*" [Tr. R. 7.] (Emphasis supplied.)

and further alleged —

"It was further a part of said scheme and artifice that the defendants would, be for the purpose of inducing and causing the persons to be defrauded to part with their money and property, and to purchase shares of stock of the 'corporation,' make and cause to be made the following false, fraudulent and untrue representations, promises and statements to the

persons to be defrauded, by means of oral communications and by means of written communications, circulars, bulletins, letters, telegrams, and newspaper advertisements, . . .” [Tr. R. 7.]

We repeat: There is no allegation in the substantive counts of the Indictment that it was the intent of the defendants as part of the scheme to use the mails.

In the eleventh count, which is the Conspiracy Count and the only count upon which these appellants were convicted, it is alleged that these appellants and the other defendants, Fred V. Gordon and John H. Morgan, who were acquitted, conspired —

“ . . . with E. Byron Siens, J. A. Barclay, Arthur P. Adkisson and Guy B. Davis, not named herein as defendants, . . . to commit certain offenses against the United States, to wit, to wilfully violate Section 17(a)(1) of Securities Act of 1933 (Section 77q(a)(1), Title 15 U. S. C.) and Section 215 of the Criminal Code of the United States (Section 338, Title 18, U. S. C.), and among such violations to commit the divers offenses charged against the said defendants in the First to Tenth Counts, inclusive, of this indictment, the allegations of which Counts, descriptive of the said defendants in the sale of the common stock of Union Associated Mines Company by the use of the United States mails, employing a scheme and artifice to defraud, and of the connections of said defendants therewith, and descriptive of the defendants’ use of the United States mails in furtherance of the said scheme as they had devised it, are hereby incorporated by reference to said First to Tenth Counts, . . .” [Tr. R. 33 and 34.]

We earnestly contend that this is not a sufficient allegation that these appellants formed a conspiracy which contemplated the use of the mails.

The inclusion of this Indictment of the section numbers of the Statutes, which it is claimed these appellants conspired to violate, "form no part of the Indictment, and neither add to nor take from the legal effect of the charge." *United States v. Nixon*, 235 U. S. 231, 235.

In *Taylor v. United States*, 2 F. (2d) 444, at 446, the Circuit Court of Appeals for the Seventh Circuit states:

"The indictment is a pleading. Its sufficiency must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of section 135 of the Criminal Code or of section 1014 of the Revised Statutes of the United States neither adds to nor detracts from the allegations which alone must measure the sufficiency of such pleading."

These deficiencies in this Indictment as to the allegations of the conspiracy cannot be supplied by the following language from the Indictment [Tr. R. 34] that —

". . . each and all of the said acts of each and all of the defendants so described in said first to tenth counts, inclusive, of this indictment are now here designated as overt acts of said defendants, done in pursuance of and to effect the objects of said conspiracy, . . ."

In *United States v. Britton, et al.*, 108 U. S. 199; 27 Law ed. 698, it is stated:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the

object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

However, quite apart from the defects in this eleventh count, and particularly in face of the fact that Mr. Morgan and Mr. Gordon, the other two indicted co-conspirators, were acquitted on all counts in the Indictment, the language hereafter quoted might well be applied so far as these appellants are concerned.

From *Farmer v. United States* (C. C. A. 2), 223 Fed. 903, in which count one of the Indictment charged a conspiracy to commit a violation of the Mail Fraud Statute, and the Court said:

"We do not find in this record sufficient to warrant the inference that on January 2, 1910, when the conspiracy was formed, the conspirators intended to use the mails . . . Since inference is not enough to make out full intent under count 1, and there is no direct evidence of it, we think conviction under this count should be reversed."

In *Schwartzberg v. United States* (C. C. A. 2), 241 Fed. 348, it is declared "that an inspection of the record does not justify the finding necessary to sustain the conspiracy count, viz.: that there was an intent on the part of the conspirators to use the mails in the execution of the scheme."

In a dissenting opinion in *Burns v. United States*, (C. C. A. 8), 279 Fed. 982, Judge Sanborne uses this interesting language:

"... this is a prosecution for the offense of forming the conspiracy denounced by section 37 of the Criminal Code to misuse the mails to commit the offense denounced by section 215 and it was indispensable to the conviction of the defendant Burns of this offense that there should be substantial proof that when he participated in the formation of or joined the conspiracy he had the criminal intent that the mails should be used to execute it. Such an intent, it is held, may be inferred from the fact that the conspiracy is impossible of execution without the use of the mails but that it is not lawfully inferable from the fact that other members of this conspiracy used them in effecting the scheme to defraud. In other words, one may join in a scheme or artifice to defraud and yet stop short of intending to use the mails for that purpose, and in such a case he is not guilty of the conspiracy denounced by section 37 . . ."

Merely because these appellants were convicted under the Conspiracy Count, the convictions should not be sustained on less evidence than would be required to sustain a conviction on a substantive count.

In *People v. Rodriguez*, 37 Cal. App. (2d) 290, 294, Mr. Justice Doran said:

“It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally.”

Under the law and facts above mentioned, the motions for arrest of judgment and to vacate the judgments of convictions should have been granted.

Bond v. Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835;

Banta, et al. v. United States, (C. C. A. 9), 12 F. (2d) 765, 766;

Crank v. United States, (C. C. A. 9), 61 F. (2d) 620.

POINT V.

Error in Admitting in Evidence Government Exhibit No 6, the Minutes of Union Associated Mines Company.

Under this heading we propose to discuss the Assignment of Error IX [Supp. Tr. pp. 604, 605], reading as follows:

“Said District Court erred in overruling the objections of said defendants to the admission in evidence, and admitting in evidence Government Exhibit No. 6, the minutes of Union Associated Mines Company which were identified by the witness Truman. The grounds of the objections and the exceptions were as follows:

‘Mr. Blue: If the Court please, I have no objection so far as the foundation is concerned except that on behalf of the other defendants I object to the minutes as set forth on the ground it is hearsay as to them, and there is no foundation as yet laid as to in any way connect any of the defendants with the preparation of these minutes, and I therefore urge that objection to them.

Mr. Evans: Do I understand you correctly, Mr. Blue, that you are stipulating on behalf of all of the other defendants that the —

Mr. Blue: They are the minutes. There is no question about that.

Mr. Evans: — Union Associated Mines Company and may be introduced subject to their objection as to their competency and relevancy and materiality?

Mr. Blue: And it is definitely hearsay as far as the other defendants (except Morgan) are concerned.

The Court: All right. They may be received.

Mr. Blue: Exception.’ ”

There is not the slightest bit of evidence in the entire record that any of these appellants ever saw or even heard of the minutes of Union Associated Mines Company. None of these appellants had anything whatever to do with the preparation of those minutes. By what rule they could be offered or received in evidence is impossible for us to understand. Mr. Zell Truman was on the witness stand for the Government at the time the minutes were offered and received in evidence [Tr. R. 136].

POINT VI.

Error in Admitting in Evidence Testimony From the Witness Harold V. Dodd as to Oil Production in the Devil's Den Area in California.

Under this heading we propose to discuss the Assignment of Error X [Supp. Tr. pp. 605, 606, 607], reading as follows:

“Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Harold V. Dodd, as to the oil production in the Devil's Den area in California, the grounds of the objections and the exceptions being as follows:

By Mr. Manster:

What is known generally as the Devil's Den area embraces about two or three townships and embraces 12 to 18 sections, a section being 640 acres [Tr. 665]. At any time during 1938 the highest number of wells producing in that area was 20.

Q. Can you tell us what was the total amount of barrel production from those 20 wells?

Mr. Cannon: I will object to that as being immaterial altogether. [Tr. 666.]

* * * * *

The Court: Well, what we are primarily interested in is the value of these 40 acres, and all you attempt to show first by the witness is that this well has been drilled within three-quarters of a mile away.

Mr. Manster: That is right.

The Court: And therefore we were to draw whatever inference we could from that as to the value of this land, and subsequently, on cross examination, the witness said that it wouldn't make any difference.

Mr. Manster: We contend that is some indication of the probability of finding oil. If a dry hole is drilled within three-quarters of a mile in a particular area, we contend it is some indication as to whether or not oil in productive quantities would be produced.

Now, it has been brought out here that certain areas, certain acreage in the Devil's Den area have produced oil, and we would like to show just what the production was in 1938 and 1939.

Mr. Cannon: Then I will add to my objection heretofore given that this is an attempt to impeach his own witness.

Mr. Manster: No, I am not impeaching him at all, I am merely asking for his records.

The Court: Go ahead.

Mr. Cannon: Exception.

The Witness: 9,094 barrels." [Tr. 667-668.]

Nothing much could be added to the Assignment of Error itself in support of our contention that the evidence was improperly admitted.

It was the contention of the prosecution that the Devil's Den lease was transferred from Mr. Gordon and his wife and others to one Millener on December 29, 1938, and that Mr. Millener on January 5, 1939, leased the particular property or assigned his interest in that lease to Union Associated Mines Company in return for a block of 235,000 shares [Tr. R. 329]. The Government contended that as of December 29, 1938, a dry hole had been drilled three-quarters of a mile south of the land covered by the lease in question [Tr. R. 330], but the prosecution also admitted that none of the defendants other than Mr. Gordon had anything whatever to do with the spudding in of the well [Tr. R. 331]. No evidence was offered or received showing or even tending to show that any of the defendants, including these appellants ever knew anything about the drilling of that dry hole or as to the production of oil in the Devil's Den area, and under those circumstances the evidence offered and received through Mr. Dodd was highly prejudicial and was hearsay, certainly as to these appellants.

Under such circumstances, it could not possibly be held that any such testimony as given by Mr. Dodd would be proper in attempting to prove that these appellants did "assign and cause to be leased and assigned, unproven and undeveloped property claimed by defendants to be of value to said 'corporation,' and secure for themselves from said 'corporation' 235,000 shares of the stock of said corporation," [Tr. R. 5, 6], as the indictment charges.

POINT VII.

Error in Admitting in Evidence the Testimony of the Witness Paul Julian Howard as to the Assessed Value of This So-Called Devil's Den Land.

Under this heading we propose to discuss Assignment of Error XI, [Supp. Tr. pp. 607, 608, 609] reading as follows:

“That said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Paul Julian Howard, as to the assessed value of certain land in Kern County, California. The grounds of objections and the exceptions were as follows:

Q. Now in pursuance of your official duties, did you make a valuation of the oil and mineral rights of that tract known as the northeast one-quarter of the northwest one-quarter, Section 2, township 25, south range 18-E in Kern County, California?

Mr. Cannon: I will object to that as being immaterial, and no foundation having been laid.

Mr. Manster: I am limiting it to 1939 at the time.

Mr. Cannon: I will object, then, on the further ground —

Mr. Manster: I beg your pardon. It is 1938.

Mr. Cannon: I will object, then, on the further ground that there is no issue in the indictment towards which this testimony would have the slightest probative value. We are not charged with selling land for something more than it was worth, nor making any false representations to any person as to its value. It is not part of the scheme alleged. [Tr. 728-729.]

Mr. Manster: We maintain it is material on the allegations of the indictment which states that these defendants leased and assigned unproven and undeveloped properties.

Mr. Cannon: It does not go to the value. It goes to the proven or unproven.

Mr. Manster: We maintain, Judge, that the valuation of oil and mineral rights placed by the responsible State official who is charged with that function, is extremely relevant and material on the issue of whether this particular tract was proven and developed or not.

Mr. Blue: May I say something? Pardon me, Mr. Cannon. There is no witness that has appeared to justify any assumption that there was any representation made that this land was proven and/or developed.

Mr. Cannon: That isn't the point that I am making now.

The Court: That isn't the point. [Tr. 729.]

* * * * *

Mr. Cannon: The point I am making now, Mr. Blue, is that there is no allegation here with respect to any part of the scheme having anything to do with the value of the land.

The Court: Well, only in connection with whether it was proven or unproven.

Mr. Cannon: I say the assessed value.

The Court: If it were proven, I suppose it would have a higher assessed value.

Mr. Cannon: Probably.

The Court: You can limit it to what he based his valuation on.

Mr. Cannon: Of course, I will submit to Your Honor's ruling, but reluctantly, and take an exception, and I would like the objection to stand as to this entire line of questioning covering this tract." [Tr. 729-730.]

What has already been said under the discussion under Point VI on Assignment of Error X, could very largely be repeated here.

But these two additional points might be made so far as this Assignment of Error is concerned:

There is nothing whatever in this Indictment to the effect that the scheme embraced a plan of selling or transferring to any persons any land or lease at a fictitious value, nor was it shown that the witness, Paul Julian Howard, was in any way qualified to pass upon the valuation of the mineral or oil rights on any particular tract of land. Under such circumstances, it would not take any argument to show the prejudicial nature and the damaging effect upon these appellants of the testimony of this witness, set out on page 345 of the Printed Transcript—

"I did not place any valuation on the mineral or oil rights of that particular tract. As of 1938, I have formed an opinion as to the nature and character of that tract of land with regard to its possibility for the production of oil in commercial quantities, and in my opinion it is unfavorable. In 1939 I did not make an evaluation of the oil and mineral rights of that tract in connection with my official duties; nor did I for the 1938."

POINT VIII.

Error in Admitting in Evidence the Testimony of the Witness Frank L. Tucker and of the Witness Frank Veloz, and in Denying the Appellants' Motion to Strike Government's Exhibits Nos. 50 and 52, and Denying the Motion to Strike the Testimony of the Witness Frank L. Tucker.

Under this heading we purpose to discuss the Assignment of Errors XII, XIII and portions of XIV [Supp. Tr. pp. 609, to 616, incl.] reading as follows:

"XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank L. Tucker, concerning conversations he had with one Murphy and concerning disposition made by the said witness of certain stock in Union Associated Mines Company. The grounds of the objections and the exceptions were as follows:

Q. And tell me, if you will, the conversation between you and Mr. Murphy with relation to the Union Associated Mines stock.

Mr. Cannon: Objected to, if the Court please, on the ground it is hearsay. It can have no bearing on the issues in the case. May I ask a question on *voir dire*?

The Court: Yes.

Mr. Cannon: Did you ever talk to any of the defendants before you bought any of this stock?

Witness: No, sir.

Mr. Cannon: Or with Mr. Adkisson or Mr. Barclay?

The Witness: No, sir.

Mr. Cannon: I object on the ground it is hearsay, no proper or any foundation is laid for it at this stage of the proceedings.

The Court: He may answer.

Mr. Cannon: Exception. May I have an exception running to it all, if the Court please?

The Court: Yes. [Tr. 869.]

* * * * *

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased? A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. [Tr. 883.]

* * * * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes. [Tr. 884-885.]

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank Veloz, concerning certain conversations had by the witness with one Murphy. The ground of the objections and the exceptions were as follows:

Q. Tell us what Mr. Murphy told you with relation to the securities of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objections runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken? [Tr. 957-958.]

The Court: Yes.

Mr. Cannon: Thank you.

XIV.

Said District Court erred in denying the motions to strike certain evidence from the record made on behalf of each of the defendants. The grounds of

said motions and the rulings thereon and the exceptions taken thereto were as follows:

* * * * *

Mr. Cannon: I move to strike Exhibit No. 50 which is a check of Fred L. Hunter (Frank L. Tucker) for \$147.50 to R. L. Colburn, it being hearsay as to all the defendants and incompetent, irrelevant, and immaterial, and no proper foundation laid for it.

I can relate the circumstances, if Your Honor is not familiar with them.

The Court: I don't recall that. [Tr. 1072.]

Mr. Cannon: That is the transaction where Mr. Tucker said he had the transaction with Colburn & Company, and that Murphy suggested to him that he place an order through some brokerage, and when he asked him if he had any preference and Tucker said that he had not, the order was placed with Colburn & Company. He made the check payable to Colburn. Murphy is not even an alleged co-conspirator. It would clearly be hearsay as to all these defendants.

The Court: Do you remember where that testimony was?

Mr. Cannon: I can't give you the page, but I can give you the day he testified on it.

Mr. Manster: I have it right here, Judge. The specific testimony with respect to this check is at page 881.

The Court: I will read it.

Mr. Manster: However, the testimony is that it was at Murphy's suggestion that the order for 5,000 shares, for which this check was given, was placed by Murphy with Colburn, and I think Mr. Cannon

stated correctly that Mr. Tucker had no preference for any dealer through whom this transaction should be effected, and he permitted Murphy to select the dealer, and of course, Murphy was connected in this case with Collins in this particular transaction, and with this investor witness through the defendant Collins.

Mr. Cannon: There is no evidence of that. It was not proven. [Tr. 1073.]

The Court: There isn't any evidence of this portion of the stock delivered by Associated to Plymouth, was there, on the open market:

Mr. Manster: No, but the pertinent evidence is this. Page 876 of the transcript:

"A. Well, Mr. Murphy said there was some stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid $2\frac{1}{2}$ or $2\frac{3}{4}$ and he asked me if I had any objection to what brokerage firm he put the order in through, and I told him I did not, so, when it was confirmed that — when the sale was confirmed, I gave him the check to deliver to the brokerage firm and he picked up the stock."

The sale was effected at the suggestion of Murphy through the brokerage firms which Murphy selected. [Tr. 1074.]

The Court: Well, I will deny that motion temporarily, but I will look into it.

Mr. Cannon: Exception. May it be deemed that I have made the same motion to strike Exhibit 52 upon the same grounds, it being the R. L. Colburn purchase order.

The Court: That is a part of that same transaction?

Mr. Cannon: Yes.

The Court: The motion will be denied.

Mr. Cannon: Exception.

* * * * *

Mr. Cannon: . . . I move to strike the testimony, all the testimony of the witness Tucker on the ground that it is hearsay as to all of the defendants and no proper or any foundation was made for the introduction in evidence of that testimony, and it is immaterial so far as this case is concerned as it affects the defendants.

I call particular attention to the fact that Mr. Tucker testified specifically that he met Collins after he bought all his stock, and therefore it could have no probative value in the establishing of the scheme or the continuance thereof.

The Court: That motion will be denied."

Nothing could be more forceful in support of the manifest error in admitting the testimony of Frank L. Tucker and in denying the motions to strike that testimony than quotations from the record itself. The court must bear in mind that the witness had never talked to any of the defendants nor had he talked with Mr. Adkisson or Mr. Barclay before he bought his stock [Tr. R. 408]; that he first met Mr. Collins some time after he had bought all of his stock [Tr. R. 410]; that in buying his stock he placed reliance upon the statements made to him by one Murphy, and also on what he saw at the wells [Tr. R. 411] because at the time he bought his stock, he had never talked to any of the defendants and did not know any of them [Tr. R. 411]; that

Mr. Murphy was alone when he called to see this witness and that Murphy called to see him perhaps a dozen times altogether [P. Tr. 409]. Mr. Tucker further testified [Tr. R. 408-411, 415]:

“Murphy said he had quite a block of Union Associated and was going to sell, and wanted to know if I would be interested in taking 10,000 shares of stock at 3 cents; and that he was going to get it approved by the S. E. C. and that the prices would graduate up, he thought, as it went along. At that time I bought 10,000 shares from him for \$300.00. He said they were drilling a well out in Florence. I believe he said they had one well and was drilling on the second one . . . Murphy was alone when he called to see me; he probably called a dozen times altogether. Exhibit No. 49 for identification is a \$300.00 check dated 2-14-39, payable to the order of J. H. Collins, and signed by Frank L. Tucker, and bears the endorsement of Collins, paid and charged against the account of mine. This check was given for the 10,000 shares of Union Associated delivered to me by Murphy. The check was made payable to the order of Collins because, Murphy told me, Collins had the contract for the sale of the Union Associated stock and he was working with him and for him, and Murphy asked me to make out the check to Collins. I thereafter received my certificate for 10,000 shares. At the time of this purchase on February 14, 1939, I believed Murphy said that the well was making about 255 barrels per day, and later he told me something about the second Plymouth well. He told me that Gordon, Siens, Lacey, and somebody else were the officials of the Plymouth Oil Company; and said Lacey was furnishing the money for the drilling operations. He told me that Collins’ contract was for stocks from about 3 cents to about 26

cents per share; and that under that contract they, he and Collins, had to take about 83,000 shares per month, until the contract was filled. [Tr. 874.] I had not met Collins up to this time. I first met him some time after I had bought all of my stock. It was either in May or June. Government's Exhibit No. 50, a check dated February 20, 1939, drawn by me to R. L. Colburn Company in the amount of \$147.50 was delivered to Murphy.

Q. And will you state the occasion for your delivering such a check to him—

Mr. Cannon: Objected to on the ground it is hearsay.

The Court: He may answer.

Mr. Cannon: Exception. Go ahead. [Tr. 876] [Pr. R. 410].

(Witness continuing)

Murphy said there was stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid $2\frac{1}{2}$ or $2\frac{3}{4}$, and asked if I had any objection to what brokerage he put the order in through, and I told him I did not. So, when the order was confirmed, I gave him a check to deliver to the brokerage firm that he had picked out. I did not pick out R. L. Colburn Company. Murphy delivered the confirmation to me and I thereupon issued my check, Exhibit 50. I bought 5,000 shares through Colburn Company. Government's Exhibit No. 51 appears to be a duplicate deposit slip on the Bank of America bearing the date of February 28, 1939, and states, 'Certified Check, \$1650.' I got this certified check to pay for stock of the Union Associated. Murphy came to see me and said they lacked 55,000 shares of having the stock picked up for that month, and I

gave him a check, payable to Siens, for this 55,000 shares . . . Government's Exhibit No. 52 is a confirmation upon the stationery of R. L. Colburn & Company for 5,000 shares of Union Associated at \$147.50, under date of February 20, 1939. I received it by mail. In buying this stock *I placed reliance upon statements made to me by Murphy and also on what I saw of the wells. I did not place reliance upon statements made by any of the defendants in this case, because I had never talked to any of them, and I did not know any of them . . .*

Mr. Evans: Your Honor, at this time I wish to offer in evidence Government's Exhibits 49, 50 and 51 and 52.

Mr. Cannon: I will object on the ground that they have no bearing on the issues in this case at all, particularly in view of the last few statements made by this witness that he never talked to any of the defendants and never relied on any representations made by any of the defendants in the purchase of the stock.

The Court: All except Murphy.

Mr. Cannon. He is not a defendant. I said the defendants.

The Court: Objection overruled.

Mr. Cannon: Exception.

(The documents referred to were marked Plaintiff's Exhibits Nos. 49, 50, 51 and 52, and were received in evidence.)

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased? A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. [Tr. 883.]

* * * * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes.

* * * * *

Mr. Cannon: I move to strike all the testimony of this witness on the ground that it has no probative value in that it is wholly incompetent, irrelevant, immaterial and hearsay as against all of these defendants, no reliance having been placed by this witness upon any representations made by any of the defendants, and it further appearing that no representations of any kind were ever made by any one of these defendants to this witness.

I think that covers the suggestion made by Mr. Blue that I add to it, if I haven't already done so, that it is hearsay, because it doesn't appear that Mr. Murphy was ever authorized to speak for any of the defendants, nor does it appear that any of the defendants knew of any of the representations made.

The Court: The motion will be denied in so far as the testimony goes to the surrender of the stock.

* * * * *

(Witness continuing)

A. . . . so I bought that stock at the contract price in the Murphy contract, and paid the money over to Mr. Siens, with whom Murphy had his agreement. I bought this stock as a speculation, pure and simple, and I put in, I think, \$2,445.00 altogether. [Tr. 891.]” [Tr. R. 408, 409, 410, 411, 412, 413, 414 and 415.] (Emphasis supplied.)

All of this testimony given by Mr. Murphy was clearly hearsay as against all of the defendants. It was highly prejudicial because it related to matters specifically referred to in the Indictment as being the false representations which these appellants were charged with having made. To attempt to establish such representations by this hearsay evidence is manifestly prejudicial.

The Printed Record itself is the strongest possible argument that can be made to establish the error of the court in admitting in evidence the testimony of the witness Frank Veloz. We quote from that record at the point where Mr. Veloz was under examination:

“My name is Frank Veloz . . . I know James Collins very slightly but prior to the purchase of that stock I had not known Collins. I had met him once at the Ambassador Hotel. I had known Joseph Murphy about 12 to 15 years, and I had a conversation with him with respect to the Union Associated Mines and the Plymouth Company, the first conversation being in the early part of 1939.

Q. Tell us what Mr. Murphy told you with relation to the securities of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objection runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken?

The Court: Yes.

Mr. Cannon: Thank you. [Tr. 957-958.]

(Witness continuing):

Murphy was a good friend of mine and he told me he was associated in this particular proposition; that the chap involved did not have sufficient money to keep a contract which he had to purchase a certain amount of stock each month, and mentioned Collins' name. Murphy said that Collins had to purchase so many shares each month, and that he and Murphy didn't have sufficient cash so they needed \$1,000 to meet the obligation, and he told me that if I would let them have the \$1,000, he would pay it back in ten days or give me 25,000 shares of stock. I received that stock, but I did not receive back the \$1,000. I was a little bit confused as to the wells that were drilled, but it was said that they had a couple of wells already producing, and they were going to drill another one, and the stock was supposed to go on the Exchange. I think it was said that a few hundred gallons, that is from 1 to 300 gallons or

barrels were being produced. Murphy told me that the stock in a few days was going on the Salt Lake Stock Exchange, and it was going on at a higher price than I paid for it, and that he was going to dispose of some of the stock that he had and pay me back the \$1,000, or if I wanted to keep the stock, I could do that and make a profit on it. He said the stock would go on the Exchange around 6 cents. I do not recall ever meeting Barclay, president of the Salt Lake Exchange. Collins and Murphy had \$1,200 when they were in the lobby of the Ambassador Hotel, and I drew a check for \$1,000 and went into the branch bank in the Ambassador and the bank gave them a check for \$2,200. Only once did Collins participate in any of the conversations I had with Murphy, and that was in the lobby of the hotel. Collins merely corroborated Murphy's statements.

Mr. Cannon: I will move to strike that out.

The Court: Oh, let it stand.

Mr. Cannon: Exception. [Tr. 961.]” [Tr. R. 445, 446 and 447.]

The mere statement that Collins “corroborated Murphy's statements,” in the face of the motion to strike, means nothing, and particularly in view of the later testimony of this same witness where he says:

“Prior to the conversation that I had with Murphy and Collins in the lobby of the Ambassador Hotel, I had already made arrangements with Murphy to buy this stock or to lend him the \$1,000, *even before Collins ever came there. The representations that were made by Murphy concerning the listing of the stock, the drilling of the wells, and the production of the wells, were all told to me before I ever met Collins; and I agreed to let Murphy have this \$1,000 upon those representations, because of my friendship for Murphy.*” [Tr. R. 447, 448.] (Emphasis supplied.)

POINT IX.

Error in Denying Motion to Strike Certain Documentary Evidence and Oral Testimony.

Under this heading we purpose to discuss the following portions of Assignment of Error XIV, reading as follows [Supp. Tr. pp. 604, 605]:

“Said District Court erred in denying the motions to strike certain evidence from the record made on behalf of each of the defendants. The grounds of said motions and the rulings thereon and the exceptions taken thereto were as follows:

Mr. Cannon: If the Court please, at this time I want to make some special motions to strike, if I may have the Clerk's list of exhibits?

First, I want to move to strike on behalf of all defendants, to strike from the record Exhibit 41 in evidence, copies of a log of an oil or gas well, Division of Oil and Gas, on the ground that no proper or any foundation has been laid for the introduction in evidence of that document; on the further ground that on its face alone it shows to be incompetent, and on the further ground that it is a narrative of past events.

They are copies, not the originals. No witness was produced to identify them except the fact that they got them from Plymouth Oil office. They are dated September 26, 1939, purporting to set up what occurred on December 14, 1938 [Tr. 1069].

They are not signed by any witnesses produced. One of them bears no signature, typewritten or otherwise, and the other one, attached to the sheet, is dated June 20, 1939, purporting to reflect what occurred on February 28, 1939. [Tr. 1070.]

Do you want to rule on them separately, or shall I make them all at one time? May I pass this to the bench? It is hearsay as to all the defendants.

The Court: There is one that bears the signature of Mr. Lacy.

Mr. Cannon: But the signature has never been identified. The witness was never produced. No person was offered as a witness to testify as to the regularity of the keeping of the document or the circumstance under which it was prepared, or where the original was filed.

I insist on all of them, but the primary objection is that it purports to be a narrative of past events.

The Court: I will deny your motion.

Mr. Cannon: Exception. I move at this time to strike Exhibit No. 27, which is a check No. 191, dated January 7, 1939, given to John McEvoy for \$100, signed by Mathilda M. Klinger, and also Exhibit No. 28, a check of March 1, 1939, given to Mr. McEvoy for \$20, signed by Mathilda Klinger, and Exhibit 29, certain stock certificates of Union Associated Mines Company, being stock certificates delivered to Mathilda M. Klinger on the ground that each and all of those exhibits are hearsay as to these defendants, and to all of them, there being no connection shown with those checks, receipt of the money for the stock, or delivery of the stock by any of the defendants to that witness.

The Court: Your motion will be denied.

Mr. Cannon: Exception.

* * * * *

Mr. Cannon: I move to strike the testimony, all the testimony of the witnesses Klinger and Walker on the ground that there is, so far as defendants Collins and Morgan are concerned, and Mr. Fischgrund

and Mr. Schirm on the ground that the testimony is altogether hearsay as to them, it not appearing that they had any connection with the transaction at all and were not present at conversations [Tr. 1075] had or representations made at any of these conversations, and if that motion may be deemed to be made without referring to the book and page of the transcript, because I don't have the transcript, and I can't do it.

The Court: That motion will be denied.

Mr. Cannon: Exception.

* * * * *

Mr. Cannon: . . . I will move on behalf of all defendants to strike the testimony of the witness Shomate on the ground that so far as all defendants are concerned, that it embraces the transaction, has to do with the transaction which is in no way mentioned in the indictment. There is no charge in this indictment to the effect that we would assume to convey property to which there was no title to any of the persons. [Tr. 1076.]

I assume the only purpose of the testimony of Mr. Shomate was interrogation of the witness by the prosecution, indicating that he was directed toward establishing the lack of record titles in Gordon at the time he made the Millener lease, and that not having charged the defendants in the indictment whatever, it becomes immaterial and irrelevant. It has no bearing on the issues in this case and is highly prejudicial.

I make that motion on behalf of all defendants for that reason, and I make it further on behalf of all defendants except Gordon, on the ground that the transaction is entirely hearsay, and as to the rest of the defendants, it is also highly prejudicial.

In view of the fact that I don't want this Court or the Appellate Court to feel that I haven't called to the Court's attention the details of the transaction, if your Honor wants me to refresh your recollection as to the testimony, I will be glad to do that.

The Court: It was the testimony of the County Recorder, wasn't it?

Mr. Cannon: Yes, the County Recorder. He testified on the afternoon of July 13.

The Court: I will reserve my ruling on that. [Tr. 1077.]

* * * * *

The Court: The motions submitted to the Court yesterday are denied. That includes the motion to strike the testimony by Mr. Shomate.

Mr. Cannon: May we have an exception to them? Also I understand, just so the record will be clear, that the motions were also directed to the dismissal of each and every count separately, and to the indictment as a whole?

The Court: Yes, that would be included [Tr. 1163]."

Here again mere quotations from the record itself show the error in admitting the evidence. It is highly prejudicial.

Exhibit 41 is set out in the printed transcript at page 451, and in view of the allegations of the Indictment, among others to the effect that the defendants would falsely represent the production of oil received from Plymouth Oil Company well No. 1 [see Indictment, paragraphs Nos. (3), (4), (6), (7), and (9), Tr. R. 8, 9, 10], the introduction of this exhibit was very prejudicial, particularly since there was absolutely no founda-

tion to connect it with any of the defendants. As disclosed by the Printed Record, the witness Mathilda M. Klinger and Grace T. Walker is as follows:

“My name is Mathilda M. Klinger and I live in Pasadena. * * * I first heard of Union Associated through Miss McLane and purchased stock in that company through Miss Walker. Our first purchase was in October, 1938. * * * We bought 40,000 shares and paid \$1,500.00 for it by cashier's check delivered to Mr. Adkisson. Miss McLane brought Mr. Adkisson down and introduced me to him as Mr. Gordon's secretary, and I delivered the \$1,500.00 check to Mr. Adkisson * * *” [Tr. R. 315].

* * * * *

“After the initial purchase, we purchased some more stock through John McEvoy, in January, 1939. Miss Davis and I had a conversation with him in Pasadena.

Q. What, if anything, was said by Mr. McEvoy to you with relation to the Union Associated Mines Company or the Plymouth Oil Company?

Mr Blue: If the Court please, I will object on the ground that it calls for hearsay. It is incompetent. The only evidence being here that Mr. McEvoy when he called on people, acted as an independent contractor. These defendants are not bound by anything that he did.

The Court: You may answer.

Mr. Blue: Exception. And, if the Court please, without the necessity of restating the objection, it is understood as to all conversations this witness had with Mr. McEvoy and that the same objection will be understood to have been made, the objection

overruled, and exception noted. [Tr. 599.] [Tr. R. 315.]

(Witness continuing):

McEvoy said that the first well had been drilled and it was coming in at the rate of about 200 barrels a day; that they were selling it at about \$1.05 per barrel to the Standard Oil Company, and that they were making good money and they hoped soon to drill another well; that the Plymouth Oil Company were drilling the well on a 50-50 basis with the Union Associated Mines, with Plymouth Oil Company paying the expenses of drilling. McEvoy said that the Union Associated Mines Company was earning $2\frac{1}{2}$ cents a share and there were 1,400,000 shares of common stock outstanding, no other indebtedness; and that they were going to drill another well which, if it was successful, should bring in just as much oil as the other well did. McEvoy said that they were hoping to get the stock relisted on the Stock Exchange, and that they had [90] made an application, and hoped within a week or ten days to have it relisted; that it had been listed at one time and had been retired because the mine was idle. I do not know how many conversations I had with McEvoy, but I know he called several times and I talked to him on the telephone several times. He called to sell more stock. After he called to say that the second well had been drilled, and that it was producing about 300 barrels a day, he said that as soon as the stock was listed on the Exchange it would probably go to 50 cents a share, and that the Plymouth Oil Company was interested in it because of the investment and they would do what they could to help push the stock up. He said Plymouth Oil Company had an investment of about \$30,000.00 in the well. I made another purchase of 3,000 shares

in two lots, 2,500 shares in January and 500 shares in March [Tr. 603] at 4 cents, all from Mr. McEvoy. Miss Davis purchased 1,000 shares and Miss Walker purchase 15,000 shares, all at 4 cents a share." [Tr. R. 316.]

At this point, Exhibits 27, 28 and 29 were offered and received in evidence under Stipulation, as follows:

* * * * *

"Mr. Blue: * * * The same stipulation, subject, of course, to the running objection as to hearsay as to all these transac- [91] tions with McEvoy. [Tr. 605.]

* * * * *

In March, 1939, I received the certificates for the first purchase that I made in this stock. I do not have those certificates now because in April they were returned to Mr. Gordon for the return of the money paid for them which was \$1,500.00, and that covered the stock purchased by the 4 ladies.

* * * * *

(Witness continuing):

I met Mr. Adkisson and Mr. McEvoy but not Mr. Siens and I do not recall having met Gordon, Fischgrund or Schirm, but I met Collins one time. He came with McEvoy, but did not sell me anything. The last time I bought I gave McEvoy a \$20.00 check for 500 shares at 4 cents a share. I was taking a flyer to make it an even 3,000 shares. I knew that when I purchased stock in an oil venture that it was a gamble. When I first bought stock and put \$150.00 in it and gave that money to Adkisson, Adkisson did not tell me anything about it. I got my information from Miss McLean. [Tr. 612.] When

I bought this stock first, I knew that I had a guarantee from Gordon that if I wanted my money back I could get it; but I did not get any guarantees from McEvoy. When I requested Gordon to repay the money, I received it in the form of a cashier's check.

* * * * *

So far as any transaction that I had with Gordon was concerned, personally, all I had to do was to ask him for the money and I got it back. I did not tell him that any one had made any misrepresentations to me. I do not recall that either Mr. Gordon or Mr. Adkisson told me anything personally, when I purchased this stock from Gordon.

* * * * *

Recross-Examination

By Mr. Blue:

I was just introduced to Collins." [Tr. R. 319.]

The prosecution witness, Grace T. Walker, testified on direct examination as follows [Tr. R. pp. 320 to 321]:

"By Mr. Evans:

* * * I did not see Gordon when the stock was offered to us because I was not in town. I met John McEvoy twice, once in Pasadena and the other in Santa Monica. I had a conversation with him.

Mr. Blue: I will object to that, if the Court please. Just a moment, Miss Walker, I will object on the ground that it is hearsay as to all these defendants, and it is incompetent. There is no foundation laid justifying any conversations had between this witness and Mr. McEvoy.

The Court: The witness may answer.

Mr. Blue: Exception, and the same objection will go to all her testimony with Mr. McEvoy. [Tr. 619.]

(Witness continuing):

First McEvoy recommended to us that we get our money back on the first purchase and buy a second time to buy more because the Plymouth Oil Company had taken a 50 per cent interest, and they would naturally want to get their money back, and the first well was producing 200 barrels a day; and in the next conversation about it he said they were making 300 and it was $2\frac{1}{2}$ per cent, and that they expected they would get 50 cents a share for it, and since the Plymouth Company wanted this stock they would certainly boom the stock so it would go up, so that they would get back their 50 per cent. He said that the stock had formerly been registered at Salt Lake City but it had gone off and they were expecting to have it registered at the time. McEvoy told me at one time that well No. 1 produced 200 barrels, and the next time I saw him he said it was 300." [Tr. R. 321.]

There is no evidence that any of the appellants authorized McEvoy to make the statements that he purportedly made to the witness.

The fact that the witness testified that McEvoy told her that the well produced 200 barrels and at another time 300 barrels, shows conclusively the damage done by evidence, which cannot possibly be traced back to any authorized statement by either of the appellants, or to any scheme of which they were a part.

The very appearance on the witness stand of these two ladies in or past middle age, who testified that they have been induced by false representations made through Mr. McEvoy to purchase stock in Union Associated Mines Company, was in itself harmful to these appellants.

Surely it should require no citation of authority to satisfy this court that the evidence offered and received through the witnesses Mathilda M. Klinger and Grace T. Walker was entirely hearsay as to these appellants and was very prejudicial to the appellants. Obviously, it goes to the very crux of the charges in the Indictment that the defendants did make certain false representations as part of their scheme. The prosecution ought not to be allowed to offer as proof of that scheme, false representations made by a third party—in this instance, Mr. McEvoy—without first showing that the defendants are responsible for the representations so made by him. The court should have refused the evidence and after it was received, the court should have granted the motion to strike it.

The prosecution witness, Charles H. Shomate, testified that he was the County Recorder of Kern County and that according to his record as such County Recorder, it appeared that between December 1, 1938 and December 1, 1939, M. E. Blynn was the owner of the so-called Devil's Den property herein mentioned [Tr. R. 349]; that she became the owner of record on May 9, 1938; that

he had searched his records and could not find thereon any lease of December, 1938, between Gordon and the defendants and others to William S. Millener, nor a record of any assignment of the lease in January, 1939, from Millener to Union Associated Mines Company [Tr. R. 355].

On his cross-examination, he testified that he found of record a quit claim deed from M. E. Blynn to Fred V. Gordon on this property, which deed was filed for record in October, 1941, it being dated October 30, 1941 [Tr. R. 355], and also found a conveyance of the landowner's royalty to Farmers and Merchants National Bank of Los Angeles.

A defense witness, Roy P. Dolly, testified with respect to this transfer, that he had acquired this property for Mr. Gordon in the name of Mr. Dolly's secretary, Margaret E. Blynn; that Mr. Dolly was then acting as the attorney for Mr. Gordon; that Miss Blynn was not acting for herself in acquiring the property but was acting as the trustee for Mr. Gordon at Mr. Dolly's request. The vice of the testimony is that it was offered for the purpose of showing either that Mr. Gordon never had title to the property, or that it was never transferred to Union Associated Mines Company. The objections themselves to the testimony of Mr. Shomate, demonstrate the correctness of the appellants' contention that the evidence of Mr. Shomate was improperly admitted. We quote his testimony in the printed record from pages 347 to 355.

Conclusion.

The long time elapsed between the happening of the events referred to in the Indictment and the return of that Indictment and the further long time that elapsed between the return of the Indictment and the time of trial, may in some measure account for the startling verdicts as a result of which the two "principal" defendants were acquitted and the three minor defendants were convicted on a Conspiracy Count alone, but how ever that may be the constitutional rights of these appellants were invaded when they were not given the speedy trial provided for under the Constitution of the United States.

Furthermore, the errors of law above considered should in our opinion move this court to set aside the verdicts so far as these appellants are concerned and to discharge them.

Dated: April 4, 1946.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11037

JAMES H. COLLINS, SIDNEY FISCHGRUND, and
CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION.

BRIEF OF APPELLEE

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11037

JAMES H. COLLINS, SIDNEY FISCHGRUND and
CHRISTOPHER E. SCHIRM,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE ¹

Appellants were indicted (with Fred V. Gordon and John H. Morgan) for violating the fraud provisions of the Securities Act of 1933 (Section 17(a) (1), 15 U. S. C. A. 77q(a) (1)), and the mail fraud statute (Section 215 of the Criminal Code, 18 U.S.C.A. 338) and for conspiring (with others not indicted) to violate these statutes (Section 37 of the Criminal Code, 18 U.S.C.A. 88). The indictment contained 11 counts, counts 1 and 2 each charging a specified use of the mails in the employment of a scheme to defraud in the sale of securities in violation of Section 17(a) (1) of the Securities Act; counts 3 through 10 each charging a

¹ In our view the statement of facts set forth in Appellants' Brief is incomplete and does not accurately reflect the evidence.

specified use of the mails for the purpose of executing the scheme to defraud in violation of the mail fraud statute, and count 11 charging the conspiracy. Four of the mail fraud counts (3, 6, 7, 8) were dismissed. The jury found appellants guilty (on count 11) of conspiracy to violate the fraud provisions of the Securities Act and the mail fraud statute but not guilty on the substantive counts (R. 90-92). Defendants Gordon and Morgan were acquitted on all counts. The court suspended the imposition of sentence on appellants for one year without placing them on probation (R. 98-100). Appeals from these judgments were dismissed because the judgments were not final (148 F.2d 338, March 14, 1945). The trial court resentenced each appellant to serve one year in a federal penitentiary, suspended sentence for two years and placed them on probation for two years (R. 118-22).

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U.S.C.A. 88, provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C.A. 77q(a)(1), provides:

“It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud . . .”

Section 215 of the Criminal Code, 18 U.S.C.A. 338, in pertinent part provides:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . in any post office, . . . or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive . . . therefrom . . . any such letter, . . . shall be fined not more than \$1,000, or imprisoned not more than five years, or both.”

THE INDICTMENT

Count 11 of the indictment charged a conspiracy among appellants Collins, Fischgrund, Schirm and the other defendants Gordon and Morgan, together with E. Byron Siens, J. A. Barclay, Arthur P. Adkisson and Guy B. Davis, who were named as co-conspirators but not indicted,² and “other persons, whose names are to the Grand Jurors unknown”, to employ a scheme to defraud in the sale of common stock of Union Associated Mines Company by use of the United States mails, in wilful violation of Section 17(a) (1) of the Securities Act, and to use the mails in furtherance of a scheme to defraud in violation of the mail fraud statute (R. 33-38). The acts and practices described in the first 10 counts (R. 2-33) are incorporated in the conspiracy count as overt acts in furtherance of the conspiracy. It was charged that the conspiracy existed continuously from about June 1, 1938, to about December 1, 1939 (R. 33).

² Siens and Barclay died prior to the return of the indictment.

PERSONNEL

It will be helpful at this point to identify briefly some of the persons whose connection with the case is set forth below in the statement of facts.

*Appellants*³

James H. Collins: Underwriter and salesman of stock of Union Associated Mines Company ("Union"), a defunct Utah mining corporation. He was given an option on a block of stock in Union by Plymouth Oil Company ("Plymouth"), a California corporation organized by the conspirators and used to facilitate their scheme.

Sidney Fischgrund: Vice president and a director of and attorney for Plymouth.

Christopher E. Schirm: Participant in formulation of scheme and in acquisition of control of Union, and general adviser to others in the conspiracy.

Defendants who were acquitted

Fred V. Gordon: President of Plymouth; an oil man with offices in Los Angeles.

John H. Morgan: Secretary-treasurer and a director of Union; attorney with offices in Salt Lake City, Utah.

Co-conspirators

E. Byron Siens: One of the prime movers in the conspiracy; deceased at the time of the indictment.

J. A. Barclay: President of Salt Lake Stock Exchange and a securities dealer in Salt Lake City, Utah; deceased at the time of the indictment.

³ For the sake of clarity, Collins, Fischgrund and Schirm are referred to as "appellants", Gordon and Morgan, who were acquitted, as "defendants", and Siens, Barclay, Adkisson and Davis, not indicted, as "co-conspirators".

Arthur P. Adkisson: In the securities business in Los Angeles, mostly as a salesman.

Guy B. Davis: Secretary-treasurer, accountant and field supervisor of Plymouth.

Others

Christion Vrang: Geologist; shared office with appellant Schirm and defendant Gordon.

John McEvoy, Joseph Murphy and Logan Metcalf: Securities salesmen; operated with and under Collins.

R. A. Dunnigan: Attorney, sharing office with Fischgrund.

STATEMENT OF FACTS⁴

The evidence discloses a conspiracy and a scheme among the appellants, co-conspirators and others, to defraud the public by manipulating the market in the stock of Union and making false representations to induce the purchase of the stock at artificially inflated prices. The same evidence which proved the scheme also established the conspiracy to devise and employ the scheme. Thus in referring to evidence showing the operation of the scheme we thereby detail the proof supporting the conspiracy conviction.

The origin and nature of the scheme

Correspondence in July and August, 1938, in which appellant Schirm and defendant Morgan, an attorney with offices in Salt Lake City, participated, shows the formation of the scheme. The scheme was to acquire, with a minimum outlay of funds, control of a dormant mining corporation

⁴ Where the Government's exhibits and Defendants' exhibits are not reproduced in the printed record, reference is made to the original exhibits transmitted to this Court (see R. 598). They are designated "GX" and "DX", respectively.

having a large amount of treasury stock and, because of having been listed on the Salt Lake Stock Exchange, being known to a substantial number of members of the investing public.

As a next step it was contemplated to organize an oil company which would undertake the drilling of an oil well, and to transfer interests in the prospective well to the mining corporation in exchange for treasury stock of the mining corporation. This was to be followed by market rigging operations in the stock of the mining company which were designed to raise the price of that stock in the over-the-counter market, to be followed by relisting that stock on the exchange in order to push up the price even more (R. 207-23; see R. 150, 560).⁵

In carrying out the conspiracy, Union, a defunct Utah corporation, was chosen as a suitable vehicle at Schirm's suggestion (R. 559). Union had been organized in 1929 to develop certain mining claims, and its stock had been listed on the Salt Lake Stock Exchange (GX 1, R. 140, 202). Its properties, however, had never been commercially devel-

⁵ Enclosed in a letter dated August 17, 1938, addressed to Morgan in Salt Lake City from Christion Vrang, a geologist who, with Schirm, shared the office of defendant Gordon in Los Angeles, was a "Proposed Plan to Finance an Oil Company", which reads in part as follows: ". . . a new company is out of the question if one desires to raise capital, therefore the only method is to secure control of an old company, preferably a mining company whose stock is or has been listed and thru advertising make the public become interested in the issue by drilling wells and telling about it in the papers. The old method of salesmen going and soliciting investors is obsolete. * * * the first thing to do is to form a holding company to operate thru * * * When a well is completed, or sooner if desired, the well is turned over to the mining company for stock, which in turn is placed on the market to raise new money. The mining company should be a native of a state which has liberal laws and stock can be readily marketed in several states. * * * In this manner the original holding company always has control of the mining company. Control of its own company which never sells a share of its stock, excepting the original shares that are issued to its original incorporators and control of the production" (R. 216-220).

oped; its right to transact business in the State of Utah had been forfeited and its charter suspended for non-payment of the annual corporation franchise tax (GX 6; R. 134, 135); and its stock had been delisted in 1936 for failure to file the required financial reports (R. 140, 202). Union did not have the necessary funds to pay a fee to an auditor to prepare these reports (R. 140). It had never paid any dividends on its stock (R. 134, 536), and had levied numerous assessments upon its outstanding stock between 1931 and 1935. Presumably through cancellation of outstanding shares of those who failed to meet assessments, the record shows that the assessments had resulted in the retirement of more than two-thirds of the outstanding stock to the treasury (GX 7; R. 135, 536). In August 1938, out of an authorized capitalization of 3,000,000 shares of 25¢ par value common stock, approximately 789,000 shares were outstanding, of which about 350,000 shares were held in Salt Lake City, and the balance scattered outside Utah (GX 7; R. 151, 200, 221). On September 2, 1938, a block of over 200,000 shares of Union stock, constituting working control, was purchased over-the-counter by the conspirators at about 2/5¢ per share (R. 151). The background of this purchase is set forth below.

Acquisition of control of Union

On August 19, 1938, appellant Schirm wrote a letter to defendant Morgan referring to Morgan's statement that 200,000 of the 350,000 shares held in Salt Lake City could be purchased, and advising Morgan that "one of us" would leave for Salt Lake City to negotiate the purchase if conditions were favorable (R. 221-2). In this letter Schirm also wrote that defendant "Gordon has an oil company of which he is president called the Plymouth Oil Co." which will obtain leases to oil lands, "start a well and turn same over to the Union Associated for a certain block of stock . . . The well would be known from that time on as the Union Associated well."

On the same day that appellant Schirm wrote this letter, appellant Fischgrund, defendant Gordon and co-conspirator Davis incorporated Plymouth under the laws of the State of California, with its principal place of business in the County of Los Angeles, for the stated purpose among other things of producing and dealing in oil and of dealing in securities "of other corporations" (R. 382-6, 531-2). Fischgrund, as vice president, Gordon, who was president but advanced in years, and, to a lesser extent, Davis, as secretary-treasurer, controlled Plymouth and were its sole directors, officers and stockholders throughout the period covered by the indictment (R. 523, 531, 533, 577, 578). Plymouth checks were signed by Fischgrund and Davis (R. 387). Although Plymouth had an authorized capitalization of 1,000,000 shares of 10¢ par value stock, only 1,000 shares were issued—400 each to Fischgrund and Gordon and 200 to Davis (R. 385, 531). No additional shares were ever issued (R. 531).

On September 2, 1938, the conspirators purchased in Salt Lake City 200,033 shares of outstanding Union stock for \$800, or about 2/5¢ per share (R. 151, 167, 176, 196).⁶

⁶ The \$800 was borrowed from one A. A. Julian who was promised, in return, \$1500 in cash and some Union stock. An agreement was entered into by Julian, Siens and Adkisson, dated September 2, 1938, providing that the "200,000" shares of Union stock purchased by Siens and Adkisson were to be issued in Julian's name and delivered to him; that Siens and Adkisson were to sell enough of these shares to net Julian \$1500, and that the balance of the shares was to be divided equally among the parties. The agreement further provided that Siens and Adkisson would cause Plymouth to consummate a contract with Union to drill a well in the Torrance oil field and assign to Union 50% of the proceeds, in exchange for 635,000 shares of Union's treasury stock, and that all the moneys received from the sale of any of these shares would be paid to Julian until he had received \$1500 (R. 152-4).

However, Adkisson and Siens did not wait for the sales of stock, but at defendant Gordon's suggestion, borrowed \$1500 from Gordon's nephew to repay Julian so as to obtain the stock held by him as collateral (R. 167-8). Adkisson testified that Siens wanted to get the stock out of Julian's hands as quickly

This purchase gave the conspirators control of Union (R. 138-9, 221-2) and they provided the necessary funds to reinstate its charter (R. 225, 230).⁷ Holding this large block of Union stock, the conspirators were now in a position to dictate the transactions with Union resulting in their acquisition of large blocks of its treasury stock.

Acquisition of Union stock by conspirators

At a special meeting of the board of Union in Salt Lake City on September 6, 1938, Union accepted an offer of Plymouth to secure a drilling site in a producing area in the Torrance oil field, complete a well (No. 1) and deliver to Union 50% of the proceeds of the total production from said well in consideration of 635,000 shares of Union's treasury stock. Union accepted the offer (GX 6; R. 145). On January 4, 1939, the board of Union accepted an offer of Plymouth to drill another well (No. 2) in the Torrance oil field in exchange for another block of 635,000 shares of Union's treasury stock, and also agreed to accept an oil and gas lease in the Devil's Den area in Kern County, California, from one William S. Millener in exchange for 235,000 shares of its treasury stock (GX 6).

1. Contract for well No. 1

Pursuant to the September 6 resolution of Union's board, appellant Fischgrund and an office associate prepared the contract between Union and Plymouth, dated September 21, 1938 (R. 532-3), by the terms of which Plymouth,

as possible because he was "afraid" Julian "would throw it on the market and hurt our market" (R. 167-8). Gordon then reimbursed his nephew by selling, on October 24, 1938, 40,000 shares of Union stock at $3\frac{3}{4}\phi$ per share to four women who gave Gordon a check for \$1500, payable to Plymouth (R. 173, 314-15; DX B). Gordon guaranteed the purchasers against loss and subsequently refunded their money (R. 172-3, 318, 580; DX F).

⁷ Union's reinstatement became effective September 8, 1938 (GX 6; R. 134).

which had acquired an oil and gas lease on a tract of land in the Torrance oil field (R. 524), assigned to Union, in consideration of 635,000 shares of Union treasury stock, a 50% interest in the gross production of oil and gas from a well (No. 1) to be drilled on this tract.⁸ Plymouth agreed to pay the drilling expenses and landowners' royalty with respect to this well (R. 252-3). The contract was signed in behalf of Plymouth by appellant Fischgrund and co-conspirator Davis (R. 254). This block of Union stock was issued in various denominations in the name of appellant Schirm, who endorsed the certificates for sale to the public (R. 175, 184-5, 195).⁹

It will be noted that under this initial contract with Union, Plymouth not only conveyed a 50% interest in the well, but also undertook to pay 100% of the drilling expenses even though Plymouth and the conspirators acquired only part of the outstanding stock of Union, leaving in the hands of the public almost one-half of Union's outstanding stock. Thus, the conspirators had in effect given to the holders of the outstanding shares of Union nearly a 50% interest in one-half of the profits, if any, from well No. 1 for no rational consideration. The only apparent explanation for such an arrangement is the conspirators' expectation that it would facilitate unloading the Union stock held by Plymouth and the conspirators at prices inflated through market manipulation.¹⁰ Had there been a straightforward and bona fide oil drilling venture the promoters would have

⁸ Under the contract, Plymouth in addition assigned 25% of its interest in the oil and gas leases on the Factory Center and Lomita Tracts in Los Angeles County (R. 141, 143, 251-2, 255-6). It does not appear that Union derived any income from these interests (see R. 419).

⁹ As of August 23, 1939, 499,000 of the 635,000 shares issued to Schirm were held by 42 different individuals; the balance was in the name of Schirm (R. 196).

¹⁰ As we show below (pp. 17-18), the return to Union under this contract enabled it to pay a dividend, which was in furtherance of the conspiracy, although the well-drilling enterprise as a whole was operated at a loss.

retained for Plymouth a 100% interest in any profits and would have made direct offerings of Plymouth's stock only to the extent necessary (R. 537). The record contains a number of indications that the oblique form of the promotion was designed to avoid the requirements of the Securities Act or requirements of state laws applicable to public offerings of security issues.¹¹ The transfer of the interest in the well in exchange for the stock of a defunct mining company which had no value seems consistent with the purpose to manipulate the market in the mining company stock (see R. 242), rather than to carry on a legitimate oil and gas development.

2. *Devil's Den Lease*

On December 29, 1938, defendant Gordon and others leased to one William S. Millener, an occupant of Plymouth's office suite (R. 475), a 40-acre tract located in the Devil's Den area of Kern County, California (R. 264-83, 578-9). This lease was prepared by appellant Fischgrund (R. 553). Millener's tenure under the lease was conditioned upon drilling a well on the tract within a prescribed period of time (R. 266). Shortly thereafter, Millener, who served as a dummy in the transaction (R. 572, 579), assigned the lease in blank and left the lease with Fischgrund and his associate, who had prepared the assignment (R. 81). Subsequently, Union was made the assignee (GX 6, 7). On February 25, 1939, Union issued a certificate for 235,000 shares in the name of Millener, and on March 6, this certificate was broken up and the shares issued in the name of the Dunnigan Estates, Inc., R. A. Dunnigan, with whom

¹¹ "Of course, I realize this could not be set up before the Corporation Department or the S. E. C." (R. 243-244; see also R. 217). Violation of the registration requirements of the Securities Act was not charged in the indictment and it is unnecessary to express an opinion as to whether these requirements were successfully circumvented.

Fischgrund shared an office, and A. A. Julian (R. 195).¹² All the shares issued to Dunnigan Estates, Inc., and about two-thirds of the shares issued to Dunnigan appear to have been disposed of (R. 195-6).

Two officials of the State of California, who qualified as experts (R. 328, 336, 343), testified to the unfavorable prospects of the tract for the profitable production of oil (R. 336-7, 345). The deputy state oil and gas supervisor and petroleum engineer for Kern County testified that his records showed that the total of oil production from oil wells in the Devil's Den area for 1938 and 1939 averaged about 1 barrel of oil per well per day and that a dry hole had been drilled in the vicinity of the tract (R. 331, 334-5). The chief appraisal engineer of Kern County, who also served as assistant county assessor, and whose duties included the evaluation of oil and mineral rights, testified that he placed no valuation upon the oil and mineral rights of the tract in question in 1938 and 1939 (R. 345). No well was completed on this tract (R. 419).

3. Contract for well No. 2.

On January 5, 1939, Plymouth entered into a contract with Union by which Plymouth agreed to drill a well (No. 2) on a lot adjacent to well No. 1 in the Torrance field and to assign to Union one-half of the gross production from this well after the payment of drilling expenses and landowners' royalty had been deducted, in exchange for 635,000 shares of Union treasury stock (R. 257-62). The contract exempted these shares from the payment of the first dividend to be declared by Union (R. 262). Appellant Fischgrund and his associates prepared the contract for Plymouth and it was executed in behalf of Plymouth by

¹² Millener, in an affidavit dated December 28, 1940, stated he gave no consideration for the lease from Gordon, and received none for his assignment in blank. He recalled signing several documents in connection with the assignment, but could not say whether a Union stock certificate was among them (R. 81-2).

Fischgrund and co-conspirator Davis (R. 260, 532). This block of Union stock was issued in one certificate in the name of Plymouth (R. 195); the certificate remained intact and was not sold to the public (R. 144, 195).

Manipulation of the over-the-counter market in Union stock

The conspirators laid the ground work for the operation of their scheme by acquiring control of Union and transferring large blocks of its stock to Plymouth or their nominees. Beginning shortly after the well No. 1 contract was entered into, they manipulated the market in order to inflate the price of the stock. As a result of these manipulative activities, the over-the-counter price of Union stock was artificially raised one thousand percent from a fraction of one cent (about $2/5\phi$) a share on September 2, 1938, when control of Union was acquired by the purchase of 200,033 shares, to 4ϕ a share in March 1939, and held at about 3ϕ until August 1939.

1. *"Cleaning up the cheap stock"*

The first step in the manipulative activities of the conspirators was to "clean up the cheap stock that was on the market" and stop any selling of Union stock (R. 169). The conspirators were apprehensive that sales of the shares at this time would depress the market and interfere with their efforts to raise the market price of the stock (R. 169, 170). Co-conspirator Barclay,¹³ president of the Salt Lake Stock Exchange, agreed to lend his assistance and also promised to get brokers interested in the stock (R. 169). He suggested to Adkisson that a letter be sent to Union's stockholders requesting them not to sell their holdings (R. 169). On September 29, 1938, shortly after the date of the Plymouth-Union contract with respect to well No. 1, Union sent a letter to its stockholders praising the prospects of this venture and urging them to hold their shares (R. 145-7).

¹³ Deceased at the time of the indictment herein.

Barclay also suggested that Adkisson clean up the cheap stock by placing a bid with him at 1¢ a share and, when the stock offered at that price was purchased or if none was offered, raising the bid progressively (R. 169-170). The procedure was aptly described by Adkisson (R. 169, 189) :

“In starting a market operation, the first thing you have to do is acquire your stock at the cheapest price, lower than you expect to bid for it to begin with. You have that incentive of having a block of stock which you want to make valuable.

* * * *

“. . . By placing progressively higher bids that affects the market so as to cause it to rise; and by raising the market price in that fashion I would say that that was rigging the market . . .”

Pursuant to Barclay's suggestion, Adkisson placed 10 progressively higher bids with Barclay from the end of September 1938 to the end of the year, on behalf of himself, appellant Fischgrund, co-conspirator Siens, and Fischgrund's office associate (R. 170, 356-62). The opening bid was 1¢, which was ultimately increased to 2½¢.¹⁴ During this period 10,000 shares were acquired, at 1½¢ per share, and stock was sold at a high of 3¾¢ per share on October 24, 1938 (R. 170, 358).¹⁵

These bids had no relation to the merits of the investment or the price at which the stock would have sold in a free and competitive market (R. 189). Union's only income throughout the period of the scheme was derived from its interest in well No. 1 (R. 142-3), the site for which had not even been finally selected until about October 15, 1938 (G 14: letter from Siens to Morgan, dated Oct. 15, 1938).

¹⁴ On September 27, 1938, Adkisson writing from Los Angeles to Barclay in Salt Lake City, said (R. 362) : “I quite agree with you that we are pushing the market too fast and so will instruct you to do as you suggested, that is to bid 1½ cents but if any is offered at 2 cents to take it.”

¹⁵ See note 6, *supra*.

Yet the high of $3\frac{3}{4}\phi$ during this period was reached in the latter part of October 1938, before drilling operations had been commenced (R. 171, 451).¹⁶

2. *Telegrams to Salt Lake Stock Exchange*

Plymouth commenced the drilling of well No. 1 on November 9, 1938, and completed drilling November 30, 1938 (R. 451). At Barclay's suggestion, co-conspirator Adkisson sent him numerous telegrams from Los Angeles enthusiastically describing the progress of the drilling operation, and Barclay posted them on the bulletin board on the floor of the Salt Lake Stock Exchange (R. 158, 170-1, 181-183). The acknowledged purpose of these telegrams was to stimulate the interest of brokers in Union's stock (R. 171). This device followed the pattern outlined by appellant Schirm in a letter to Morgan dated August 12, 1938 (R. 215);

“ . . . It is my purpose . . . to get the proper publicity under way to stimulate stock sales.”

However, a few days before well No. 1 came in, Barclay suggested that no more telegrams be sent because they had been understood to reflect promotional activities, and might hamper his efforts to get Union's stock relisted on the Exchange.¹⁷

Oil was first produced from well No. 1 on December 14, 1938 (R. 451). The well's highest production per day, 124 barrels, was reached the next day, December 15, 1938 (R. 451, 485).¹⁸ Neither the publicity given by the conspirators

¹⁶ Barclay attributed the failure of the stock to rise according to expectations to the influx of selling orders from Los Angeles which depressed the Salt Lake market (R. 190, 371-2).

¹⁷ (GX 15; Letter dated Dec. 12, 1938, from Morgan to Siens; see R. 573).

¹⁸ The total production for January 1939 was 2581 barrels. The highest day's pumping during that month was 120 barrels. By December 1939 the well had declined to a day's high of 16 barrels and the total production during that month was 248 barrels (R. 485).

to the drilling nor the production resulting from the well adequately fulfilled the intended effect with respect to the market manipulation.¹⁹ Adkisson therefore withdrew from the scheme in January 1939 (R. 174). But the other conspirators persisted in the scheme as we shall see.

3. *Appellant Collins' participation in scheme—the graduated price scale contract*

That the conspirators persisted in their scheme to manipulate the market in Union stock is graphically shown by the contract between appellant Collins and co-conspirator Siens in behalf of Plymouth. The contract was prepared by appellant Fischgrund. It was executed January 17, 1939, and provided for the sale to Collins by Plymouth of 1,000,000 shares of Union stock in 12 equal monthly installments commencing on or before February 1, 1939, and terminating on or before January 1, 1940. The prices to be paid by Collins for the stock ranged from $2\frac{1}{2}\phi$ per share for the first installment up to 30ϕ per share for the last installment (R. 284-90).²⁰

It is clear that for Collins to unload the stock purchased under this contract at a profit, the price of the stock had to

¹⁹ On December 9, 1938, five days before well No. 1 came in, Barclay wrote to Adkisson:

"I want to congratulate you upon the messages the Plymouth Oil Company are sending to the Stock Exchange.

"These messages would be most effective in making people become interested in UNION ASSOCIATED MINES COMPANY were it not for the fact that when every time a wire is received there also comes selling orders out of your end and you know that just kills the whole picture for if the controlling parties do not show an interest in the upward movement, what do you expect others to do?" (R. 371.)

This would seem to indicate that some of the conspirators were unloading shares for their own account, resulting in a drag on the general manipulative effort.

²⁰ Prior to this contract of January 17, 1939, Fischgrund had prepared two contracts of a similar nature between Collins and Plymouth (R. 533). These contracts are not in the record.

rise progressively higher, always above the price Collins had to pay for it under the contract in each succeeding month, until on completion of the contract the initial price would have been inflated over 1200%. Collins, Fischgrund testified, did not know much about the oil business but was experienced in the sale of stock (R. 550). It is apparent that Collins had succeeded to Adkisson's role in the manipulative phase of the scheme (R. 476-80). Collins employed Joseph Murphy, John McEvoy, a former attorney engaged in the securities business, and Logan Metcalf to assist him in the sale of Union stock (R. 291-2, 294, 295-6, 313, 409, 424, 448).²¹ According to McEvoy, Murphy "was an even partner with Collins in this contract" (R. 310). Fischgrund testified that Collins, Murphy and McEvoy were joint venturers under the contract (R. 550).

The graduated scale of prices fixed by the contract was, of course, arbitrary and had no relation to the assets of Union or to the production records of the wells in which the company had an interest. Union's interest in well No. 1 yielded \$4,115.22 to Union (R. 418),²² part of which was disbursed in a 1/10¢ dividend on August 30, 1939 (GX 6). This dividend was declared over the objection of a director of Union who had been such since 1935 (R. 130), that the money should be used "in developing the business" of Union (R. 140), and despite the fact that the production of oil from the well was rapidly diminishing. This yield to Union was approximately one-half the total proceeds from the oil produced by this well up to that time, which amounted to \$8241.44 (R. 418). The cost of drilling the well, approximating \$38,000 (R. 582), was borne by Plymouth under its contract with Union (R. 252). In addition, under

²¹ McEvoy testified that he occupied an office with Collins and Siens in the Plymouth suite, which adjoined Fischgrund's law office, "to interview anybody that might be interested in" Union stock (R. 296, 313).

²² This was more than Union had received in all the years it owned mining property (R. 139).

the terms of the contract, the 20% landowners' royalty was deducted from Plymouth's share (see GX 39; R. 388). It is quite apparent that this oil operation was being conducted at a loss, and that Plymouth would not have been in a position to pay an earned dividend on its own stock. The transfer of one-half of the returns to Union, however, put Union in funds which enabled the conspirators to cause Union to declare a dividend in order to boost the price of Union stock,²³ when in fact the well was being operated at a loss. Indeed, the sum so transferred would not have been sufficient to pay this dividend on all the stock outstanding. Fischgrund arranged matters so that 635,000 shares of Union were excluded from the dividend (GX 15: Letters of Morgan to Fischgrund, April 28, May 5, May 10, 1939). Union received no income from the oil produced by the No. 2 well because the total proceeds from its production were insufficient to pay Plymouth's drilling expenses (R. 144, 257-62, 419).²⁴

4. *Misrepresentations in sale of Union stock*

Collins agreed to sell Union stock to McEvoy at or near the prices paid by Collins under his contract, and McEvoy was to make his profit on sales to the public (R. 294, 299-300).²⁵ McEvoy was told by Collins, Murphy and Siens that Barclay could be depended on to drive the price up when

²³ On December 28, 1938, Adkisson wrote to Barclay: "Have been quite keenly disappointed in the way Union Associated Stock has acted and probably we will have to pay a dividend or bring in another well before the stock will show any signs of life" (R. 374).

²⁴ Well No. 2 opened February 28, 1939, at 156 barrels for the day (R. 471-2) and by December 1939 had declined to a day's high of 20 barrels (R. 486).

²⁵ Fischgrund testified he later prepared a contract between Collins, Siens, McEvoy and Murphy incorporating an agreement to split Collins' profits under his stock purchasing contract between the parties (R. 552-3).

the stock was listed on the Salt Lake Stock Exchange;²⁶ that well No. 1 was producing about 350 barrels per day;²⁷ and that the stock would open at about 10¢ and should in time rise to \$5 or \$10 per share (R. 292-4). McEvoy thereupon purchased from Collins 12,000 shares at 2½¢ per share, which he split with a friend (R. 293, 302). Later, Barclay told him in the presence of Collins, Murphy and others that he thought the stock would open at 25¢ a share; and when production started on well No. 2, McEvoy was told in the presence of Collins, Murphy and Millener that this well was producing about 500 barrels a day, and that production could be pushed up to 1,000 barrels a day (R. 297).²⁸

From January until March, 1939, McEvoy sold his 6,000 shares and additional shares at a profit, and for a price as high as 4¢ a share in March 1939, by repeating to his customers these and similar representations made to him (R. 294, 296, 298, 302-3, 316, 416-7). Collins, Murphy and

²⁶ The application for the relisting of Union stock which was filed with the Exchange in January 1939 was not successful (R. 202). On January 18, 1939, Barclay, as president of the Salt Lake Stock Exchange, notified the Securities and Exchange Commission that Union had filed an application for registration of its stock on the Salt Lake Stock Exchange on January 17, 1939, and that the application had been approved. This notice was received by the Commission January 31, 1939. Pursuant to the Commission's request, the "certification" of registration of Union's stock was withdrawn February 21, 1939, pending further investigation by the Commission (GX 7; R. 572).

²⁷ This figure exceeded by 125 barrels the estimate of 225 barrels made by co-conspirator Davis on December 14, 1938, as the daily production of the well "as it was flowing by heads" (R. 557). Davis, who "told certain members of the Plymouth Company in the office" his "conclusion as to the initial production of the well" (R. 555), admitted it was "rather hazardous to estimate the production of a well which flows by heads" and said this accounted for the discrepancy between his estimate and the actual initial day's production of 124 barrels (R. 557).

²⁸ As noted above, well No. 2 opened at 156 barrels for the day and rapidly declined to a day's high of 20 barrels by December 1939.

Metcalf made similar misrepresentations directly to customers with respect to both wells No. 1 and 2, and these customers in reliance thereon purchased stock from them or from McEvoy (R. 390-2, 409, 411, 414, 424-5, 426, 428-9, 446, 472).²⁹ Altogether, from January until March, 1939, Collins and his associates sold about 165,000 shares of Union stock to the purchasers who testified at the trial (R. 316, 392, 410-11, 415, 425, 445, 472).

Lyman Cromer, partner in a brokerage firm in Salt Lake City (R. 155), was told by one of the conspirators in September 1938, that Union stock would "in a short time, as soon as this drilling had started, . . . go up in leaps and bounds and for me to get in at that time and tell my customers about it"; that when re-listed it would open at 25¢ a share; and that the stock was expected to rise to \$2 or \$3 per share (R. 156-7). Later, he was told that well No. 1 had come in at about 1,000 barrels and was the "best well they had brought in in this field" (R. 159). Cromer became suspicious of these statements (R. 159, 160), but was reassured by a statement that Union would pay a dividend from the money derived from the well (R. 159) and that the stock was a "good proposition" (R. 162). On the strength of these representations, Cromer's firm purchased a total of about 200,000 shares of Union stock for its customers, at an average price of 3¢ per share, from December 14, 1938, when well No. 1 came in, to August 1939 when the dividend was paid (R. 160, 162-3). In addition, Cromer and his partner each purchased about 25,000 shares for their own accounts (R. 162, 166).

Use of the mails and of interstate commerce

The use of the mails to transmit the letters received in evidence as Government exhibits is clear (R. 203, 205,

²⁹ Lewis J. Hampton, who purchased 15,000 shares from the Collins group, testified that "while Collins, McEvoy and Murphy were present, it was stated that Plymouth well No. 2 was producing 550 but that it was good for a thousand barrels on a test" (R. 392).

325-6, 406-7, 425). Moreover, by reason of the geographical separation of the conspirators and their confederates, and the distances between them, the use of the mails and of interstate commerce was necessary to carry out the scheme. Appellants Schirm, Fischgrund and Collins and co-conspirators Siens, Adkisson and Davis operated from Los Angeles, where the offices of Plymouth and the Torrance oil field were located. The offices of Union and of defendant Morgan were located in Salt Lake City where co-conspirator Barclay also functioned as president of the Salt Lake Stock Exchange. Altogether, Morgan received over 50 letters and telegrams from Los Angeles in connection with the scheme (GX 14, 15). Over 31 letters and telegrams between Barclay in Salt Lake City and Adkisson in Los Angeles are in evidence (GX 9, 16). Frequent trips were made by the conspirators between the two cities in furtherance of the scheme (GX 6; R. 131, 150, 151, 161, 570, 571, 573).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN APPELLANTS' CONVICTION OF CONSPIRACY

Appellants' main contention, under assignments of error IV and V, is that there was no evidence under the indictment to sustain their conviction of conspiracy (Br. pp. 21-2, 34). In determining whether the evidence was sufficient to support conviction, the appellate court will not weigh the evidence or determine credibility of witnesses but will take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the government. *Suetter v. U.S.*, 140 F. 2d 103, 107 (C.C.A. 9, 1944) ; *Holmes v. U.S.*, 134 F. 2d 130 (C.C.A. 8, 1943), cert. denied 319 U.S. 776; *Hemphill v. U.S.*, 120 F. 2d 115, 117 (C.C.A. 9, 1941), cert. denied 314 U.S. 627; *Zottarelli v. U.S.*, 20 F. 2d 795 (C.C.A. 6, 1927), cert. denied 275 U.S. 571; *Shama v. U.S.*, 94 F. 2d 1 (C.C.A. 8, 1938), cert. denied 304 U.S. 568.³⁰

The evidence in the case has been set forth in detail in the statement of facts. However, a brief review of the evidence with particular attention to appellants' participation in the scheme will, we submit, show there was ample evidence to sustain the verdict and that the trial court properly refused to take the case from the jury and direct a verdict of acquittal.

³⁰ "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Abrams v. U.S.*, 250 U.S. 616, 619; *Burton v. U.S.*, 202 U.S. 344; *U.S. v. Bronson*, 145 F. 2d 939 (C.C.A. 2, 1944) ; *U.S. v. Feinberg*, 140 F. 2d 592 (C.C.A. 2, 1944), cert. denied 322 U.S. 726; *Roberts v. U.S.*, 96 F. 2d 39 (C.C.A. 8, 1938).

The record is replete with evidence disclosing that these appellants originated or joined in a fraudulent stock selling scheme in order to enrich themselves at the expense of gullible and unsuspecting investors. The evidence establishes a scheme to manipulate fraudulently the market in the worthless stock of Union Associated Mines Company, a defunct mining corporation whose stock had once been listed on the Salt Lake Stock Exchange. Running through the correspondence of the conspirators, months before any oil was produced by the oil wells in which Union was assigned an interest by Plymouth, is language which is consistent only with a fraudulent scheme to manipulate the market in Union stock (GX 15, 16). Below are a few excerpts from this correspondence showing the fraudulent intent and purpose of the conspirators to massage the market:

July 29, 1938: "I also have in mind acquiring a Utah Corporation that is already listed on the exchange, which we could use to move some stock" (R. 207).

August 15, 1938: "With the right kind of set-up I feel quite sure that considerable stock could be moved here in Salt Lake" (GX 15).

September 26, 1938: ". . . as regards the market—you are pushing it too quickly to get any stock at the low prices . . . Unless you want me to push it up to 2¢ bid, let me know, but my idea is to just let the price drag for a few days . . . Now, as I understand your orders, they are to buy up to 50,000 shares @ 2¢" (R. 356-7).

September 27, 1938: "I told him that if he would stop people from selling we would get this stock up to 5 to 7¢ and there was no sense in having people buy the stock @ 1½ or 2¢" (R. 358-9).

September 27, 1938: "I quite agree with you that we are pushing the market too fast and so will instruct you to do as you suggested, that is to bid 1½ cents but if any is offered at 2 cents to take it" (R. 362).

September 28, 1938: ". . . as we understand it now, your orders are to buy 25,000 shares UNION

ASSOCIATED MINES @ $1\frac{1}{2}\phi$ but if any is offered at 2ϕ to take it" (R. 360).

September 29, 1938: "We will . . . endeavor to handle the market so that investors will gradually acquire not only interest but confidence" (R. 364).

October 1, 1938: "Will support the market at this end and it looks as if the price is now coming up to a figure justified to a certain extent by the interest in the Company" (R. 365).

October 3, 1938: "Market here cleaned up. Think prices climbing too fast if price gets too high outside stock will come in and cause severe drop. Feel advisable for me to write outside stock and offer 3 cents (or whatever you think best). This would give better control of market . . ." (R. 368).

October 10, 1938: "I have received a number of calls in way of explanation of the Union Associated deal. I find that the response is much more favorable if it appears that the Union Associated acquired some California oil lands and then made a deal with the Plymouth Oil Company for drilling. It sounds too much like a purely stock deal for the Plymouth to furnish the land and the drilling also" (R. 242).

October 10, 1938: "On the Union Associated deal it would appear better for the Union Associated to have acquired the oil land and then they could make an agreement with the Plymouth Oil Co. for development (at least as far as newspaper publicity is concerned. Of course, I realize this could not be set up before the Corporation Department or the S.E.C.)" (R. 243-4).

October 14, 1938: "Certificate 3452 for 10,000 shares in the name of Chris Schirm was sold by Barclay today at 3ϕ . This, I think, makes the second 10,000 share certificate sold by him at that price. I don't know just what your present plans are, but I am sure the stock could be sold here at 5ϕ as easily as it could be at 3ϕ , if Mr. Barclay would show a little

strength at 5¢. The brokers all know that Barclay is representing the California brokers and if he is selling at 3¢ the market goes down immediately. If he is bidding 5¢ the market could easily go to 5¢ . . . I think you have the local market practically cleaned up and with a little strength shown, I believe the market could easily go to 5¢ or higher. Please don't think I am trying to tell you how to handle the market, but I thought you were entitled to the facts as they have come to me" (R. 433).³¹

It is clear that Union was to be used as a front in the market operations of the conspirators. The broad outline of the scheme is disclosed in correspondence, in which appellant Schirm participated, in July and August 1938, and was succinctly set forth in a "Proposed Plan to Finance an Oil Company" sent to Morgan on August 17, 1938.³² Pursuant to this scheme Schirm chose Union as a suitable corporation for carrying out the scheme and arranged the details with Morgan for acquiring control of Union. On August 19, 1938, Schirm wrote (R. 221-2) :

"Answering your letter of August 17th in which you state that the Union Associated has 700,000 shares outstanding and that 350,000 is owned in the East and 350,000 in Salt Lake and that we can get 200,000 of this 350,000 Salt Lake shares. Who will own the other 150,000 of the Salt Lake shares and would they play with us? Or would they tear down our market? Are they the same people we would buy from?

". . . For your information, here is the way we will operate here. Mr. Gordon has an oil company of

³¹ It may be noted that co-conspirators other than appellants carried on much of this correspondence. It is clear, however, that this correspondence dealt with a phase of the manipulative program the execution of which was assigned to said co-conspirators as part of the overall conspiracy, and being in pursuance of the conspiracy, was therefore binding on all participants therein, including appellants.

³² See note 5, *supra*.

which he is president called the Plymouth Oil Co. . . . The Plymouth Oil Co. will take leases and start a well and turn same over to the Union Associated for a certain block of stock and guarantee to complete the well. The well would be known from that time on as the Union Associated well. Under these conditions do you think the Salt Lake brokers would wake up and take an interest in this stock and try to sell it?

"One of us will leave here not later than next Tuesday morning if you think we can do some business there. We will have with us a Los Angeles broker who can and will talk broker language to your people and the Los Angeles brokers will do their part . . ."

The conspirators acquired stock control of Union, revived it, and then transferred large blocks of its treasury shares to Plymouth in return for interests in oil wells acquired by Plymouth. The formation of Plymouth by the conspirators and the transfer of Union's stock to it was a step in the scheme to impart a fictitious appearance of value to Union stock. Plymouth served as a conduit for the conspirators to acquire and then unload this stock on the public. As is generally the case in such stock selling schemes, fraudulent representations were made to induce investors to buy.

Plymouth was incorporated on August 19, 1938, by Fischgrund, Gordon and Davis who controlled the corporation as its sole directors, officers and stockholders. Together they held only 1000 shares out of an authorized capitalization of 1,000,000 shares, and no additional shares were issued.

Control of Union having been acquired by the conspirators, large blocks of its treasury stock were transferred to Plymouth or its nominees for interests in two oil wells and in a tract of oil land. Fischgrund and Siens acted in behalf of Plymouth in these transactions.

The first 635,000 share block of Union stock was issued in Schirm's name and he endorsed the certificates for

sale to the public. As of August 23, 1939, Schirm still held 136,000 shares (see note 9, *supra*).³³

The agreement between Plymouth and Union with respect to well No. 1 is significant because it demonstrates that here was not a legitimate oil well promotion but a prelude to manipulating the market in Union stock. Plymouth gave something of value—a half interest in a well—to an empty shell for a large block of its worthless stock.³⁴ In addition, Plymouth was to pay the drilling expenses. It borrowed the money to pay these expenses (R. 539). The sale of Union stock was not required to develop the lease. It is clear that if a legitimate oil well promotion had been contemplated, there would have been no need to bring Union into the picture. If Plymouth had not conveyed a half interest in the well to Union and the well had been a profitable producer, Plymouth's own stock would have been quite valuable. By the clever device of making Union an equal partner in the gross income from the well with Plymouth itself paying the overhead and suffering any losses in operating it, the conspirators were giving Union the appearance of a successful enterprise so that its stock could be foisted on the public.

³³ This would tend to contradict appellants' assertion that there is no evidence of Schirm's ever receiving any stock for his participation in the transaction (Br. 26).

³⁴ Appellants contend (Br. 32) that according to the opinion testimony of defendants' witness, Wents (R. 516), the interest in well No. 1, which Plymouth assigned to Union, was worth about 10¢ per share for the 635,000 share block of stock transferred to Plymouth, and ask, "Where is the fraud?" However, it is not charged that Union was defrauded, but rather that the purchasers of Union stock from the conspirators were defrauded.

Appellants state that every stockholder who purchased stock on the strength of the Plymouth transaction, was offered and did receive, when it was requested, their money back with interest at the rate of 6% (Br. 32). However, as the evidence shows, this offer covered only those certificates which "coincided with certain numbers" (R. 163). Moreover, this is no defense and certainly does not reach all those intended to be defrauded.

Fischgrund's participation is also shown by the fact that he negotiated the acquisition by Plymouth of 235,000 shares of Union stock in return for the assignment to Union of the Devil's Den lease, and the acquisition of 635,000 shares for the interest in well No. 2.

After the first acquisition of Union stock by Plymouth, the conspirators commenced the manipulative phase of the scheme which resulted in artificially raising the over-the-counter price of the stock from $2\frac{1}{5}\phi$ to 4ϕ per share, an increase of 1,000%, and was intended to raise the price ultimately to over 30ϕ a share. The first step was for the conspirators to clean up the cheap stock on the market. Then, to discourage the sale of Union stock, Union was caused to send a letter to its stockholders urging them not to sell their shares. Progressively higher bids were placed in order to remove from the market any stock offered at low prices.

Appellants refer to the fact that Adkisson, a government witness, testified on cross examination that this device of cleaning up the cheap stock is not rigging the market (Br. 29; R. 187).³⁵ Apart from the doubtful competence of such testimony with respect to one of the ultimate questions of fact in the case, this statement deals only with one step in the manipulation;³⁶ moreover, on redirect examina-

³⁵ Obviously, the jury was entitled to believe such part of any witness' testimony as it chose. In *U.S. v. Palese*, 133 F. 2d 600, 603 (C.C.A. 3, 1943) the court said: "It is true that courts have held under other circumstances that a party is bound by the testimony of a witness whom he produces. We think that rule does not apply to prosecutions in a criminal case, however. In such a case the Government does not necessarily give credence to a witness merely by introducing him, for it is the duty of the prosecution in a criminal trial to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused." Adkisson's adverse interest is apparent.

³⁶ The fraudulent nature of the device of cleaning up cheap stock as a step in a manipulation scheme has been recognized in *Koeppel & Co. v. S. E. C.*, 95 F. 2d 55 (C.C.A. 7, 1938).

tion by the government, he admitted that "placing progressively higher bids . . . affects the market so as to cause it to rise; and . . . that is rigging the market" (R. 189). He testified that he placed ten progressively higher bids with Barclay during the last three months of 1938 on behalf of himself, appellant Fischgrund and others. These bids had no relation to the merits of the investment, but were placed merely to raise the price of Union stock, in which effort the conspirators were successful up to a certain point. They sold Union stock at a high of $3\frac{3}{4}\phi$ per share on October 24, 1938, before drilling operations had started on well No. 1 and before Union had received any income.

When drilling was commenced on well No. 1, the conspirators, following the pattern set by appellant Schirm, started a barrage of telegrams to Barclay, which the latter posted at the Salt Lake Stock Exchange in order to stimulate the interest of brokers in Union stock. These telegrams described in glowing terms the progress of the drilling operation. They were stopped just a few days before well No. 1 came in, only because it was considered that their promotional nature might hamper the efforts to get the stock relisted on the exchange. Well No. 1 began to produce oil on December 14, 1938, and reached its highest production—124 barrels—the next day. The conspirators were disappointed in that their efforts to raise the market price of the stock had not fully succeeded.

Undaunted, the conspirators hit upon another device to raise the market price of Union stock. This device, which involved Collins in the scheme, was the graduated price scale option contract. Fischgrund prepared a contract which provided for the sale to Collins by Plymouth of 1,000,000 shares of stock in 12 equal monthly installments beginning on or before February 1, 1939, at prices increasing from $2\frac{1}{2}\phi$ to 30ϕ per share. Obviously, for Collins and his associates to make a profit under the circumstances, the conspirators had to use artificial means to boost the price of the stock progressively upwards and above the option price

each month. In *S. E. C. v. Torr*, 22 F. Supp. 602, 604 (S.D.N.Y. 1938), Judge Woolsey said of a similar option contract, which he held to be a manipulative device:

"This [contract] indicated a hope at least, if not a purpose, that the market should also go up if it were possible to raise it. Otherwise there would be naught in it . . .

* * * *

"This arrangement . . . constituted a joint venture between . . . the participants in the net profits.

"Their objective necessarily was the distribution of the . . . stock . . . at a profit over the call prices."

See also *Wright v. S. E. C.*, 112 F. 2d 89 (C.C.A. 2, 1940).

The jury could infer from the terms of this contract, in the light of the surrounding circumstances, that a fraudulent scheme to elevate the price of Union stock was contemplated and that Collins and the other appellants, who stood to profit from the deal with Collins, must have been aware of its fraudulent nature. Certainly the jury was entitled to believe that the purpose as well as the effect of this contract was to fix a progressively higher price for the stock which was not based on the law of supply and demand operating in a free and open market. It is clear that the graduated scale of prices fixed by the contract was arbitrary, fraudulent in purpose, and had no relation to the assets of Union or to the productivity of the wells in which Union was assigned an interest by Plymouth.

In order for Collins to sell the stock at a price higher than he had to pay for it under the option agreement, he and his associates had to misrepresent the production of the wells and make false and highly colored statements about its prospects, both as to the listing on the exchange and the price of the stock when listing was obtained. As a result of their sales campaign Collins and his associates unloaded about 165,000 shares of Union stock on those investors who testified at the trial for prices as high as 4¢ a share (in March 1939).

Union received only \$4115.22 from its interest in well No. 1 and with the help of Fischgrund it was enabled to disburse part of it as a 1/10¢ dividend on August 30, 1939, over the objection of the Assistant Secretary of Union who had been a director before control of the company was acquired by the conspirators.

The payment of this dividend by Union represented the final effort of the conspirators to boost the price of the stock. It is significant that if the conspirators had not been using Union as a front for obtaining the confidence of investors, no dividend would have been possible. The total proceeds from this well up to that time was \$8241.44. Drilling of the well cost about \$38,000, which Plymouth under its contract with Union, had to pay. Plymouth also had to pay the 20% landowner's royalty. Obviously, even if Plymouth had not conveyed a half interest in this well to Union, the former would not have been in a position to pay a dividend. The transfer of this interest to Union shows how well the conspirators had planned—for this enabled them to get a dividend paid by Union in order to raise the price of the stock at a time when the well was being operated at a loss and the market activities were not as effective as hoped. With respect to well No. 2, the total proceeds from its production were likewise not sufficient to pay Plymouth's drilling expenses. Therefore, under the contract, Union received no income whatever from this well.³⁷

³⁷ This points up the fallacy in the opinion testimony of defendants' witness, Wents, who placed a \$60,000 valuation on Union's overriding royalty in well No. 1 and a \$40,000 valuation on Union's participating royalty in well No. 2, before the production of oil, and higher valuations after production (R. 516-7). His opinion that the value of these wells to Union after they came in was greater than while the wells were drilling is not borne out by the facts. And when it is considered that 2,294,000 shares of Union stock were then outstanding and that production from wells 1 and 2 was rapidly declining (at a time when Collins and his associates were making their sales of Union stock under the option contract) the value of Union stock, far from being much greater than the prices paid for

Appellants assert there is no evidence that Schirm and Collins knew each other or had ever met (Br. p. 26), or that Adkisson had "any discussion of any kind" with any of the appellants (Br. p. 29). However, it is not necessary for conviction that all conspirators be acquainted with each other or have previously associated together. Nor is it necessary that a defendant know all of the details of the plot nor all of the means whereby the object was sought to be accomplished. A conspiracy is shown if the parties acted together to accomplish an unlawful purpose, even though individual conspirators may have done particular acts in furtherance of the common unlawful design apart from and unknown to the others. *McGunnigal v. U. S.*, 151 F. 2d 162, 165 (C.C.A. 1, 1945), cert. denied 66 S.C. 267; *Braverman v. U.S.*, 125 F. 2d 283, 285-6 (C.C.A. 6, 1942), rev'd. on other grounds, 317 U.S. 49; *Coates v. U.S.*, 59 F. 2d 173 (C.C.A. 3, 1932); *Beland v. U.S.*, 100 F. 2d 289, 290-1 (C.C.A. 5, 1938), cert. denied 306 U.S. 636. In *Lefco v. United States*, 74 F. 2d 66, 68 (C.C.A. 3, 1934), the court states:

"Common design is the essence of conspiracy. The crime may be committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but ever leading to the same unlawful result. *Allen v. United States* (C.C.A.) 4 F. (2d) 688, 691; *McDonnell v. United States* (C.C.A.) 19 F. (2d) 801; *Capriola v. United States* (C.C.A.) 61 F. (2d) 5, 9; *Williamson v. United States*, 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278;

it by investors, as appellants contend (Br. 31-2), was rapidly approaching zero.

Appellants attempt to support Wents' appraisal by arguing that if it cost \$40,000 to drill well No. 1, the 635,000 shares would be worth at least \$20,000, and that this figure must be raised to about \$60,000 because Plymouth, in addition to paying the drilling expenses, had to pay the other expenses (Br. 32). The short answer to this argument is that these expenses have no bearing on the value of Union stock which must depend on the quantity of oil produced by the well.

Pierce v. United States, 252 U.S. 239, 243, 40 S. Ct. 205, 64 L. Ed. 542. All conspirators need not be acquainted with one another, nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and coöperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before. *Van Riper v. United States* (C.C.A.) 13 F. (2d) 961; *Coates v. United States* (C.C.A.) 59 F. (2) 173.”³⁸

In any event, appellants’ assertion that Adkisson never discussed anything with the appellants is not borne out by the record. Adkisson testified (R. 184-5) :

“I know a man by the name of Schirm, and remember having a conversation with him with reference to his refusal to endorse a stock certificate. This was the latter part of December, 1938, in the office of the Plymouth Oil Company in Los Angeles and Schirm was asked to endorse the certificates of Union Associated Mines Company that stood in Schirm’s name. Siens asked him to do it, and he said he would not, and when I asked him why, he said that Siens had promised him some stock, and when he asked Siens for it the other day, that he would not give it to him. For that reason he had refused to endorse the stock. Then I asked him if he would endorse it as a personal favor to me, and he said he would, and he did.”³⁹

³⁸ Indeed, a conspiracy once having been established, relatively slight evidence is necessary to connect a party thereto. In *Tomplaine v. United States*, 42 F. 2d 202, 203 (C.C.A. 5, 1930), cert. denied 282 U.S. 886, the court said :

“It may be conceded that the evidence connecting the four appellants with the transaction was not as strong as it might have been and was disputed. However, we need not review it, as we cannot say, as a matter of law, there was no evidence at all to go before the jury. The conspiracy was conclusively established, and but slight evidence connecting the defendants was necessary. If the conflict was resolved in favor of the government, it was sufficient to support the conviction. The question presented was essentially for the jury.”

³⁹ It should also be noted that Adkisson and Collins were previously associated as employees of the same securities firm (R. 149).

It is submitted that the evidence introduced, as we have shown, abundantly supported the verdict that appellants were guilty of conspiracy.

Appellants contend that the verdicts are inconsistent because the jury acquitted Gordon and Morgan, whom appellants characterize as the "main defendants" (Br. 28, 29). This contention has no merit. *Kamanosuke Yuge v. U.S.*, 127 F. 2d 683, 691 (C.C.A. 9, 1942), cert. denied sub nom. *Mateus v. U.S.*, 317 U.S. 48; *Carter v. State of Tennessee*, 18 F. 2d 850 (C.C.A. 6, 1927); *American Medical Association v. U.S.*, 130 F. 2d 233 (App. D.C. 1942), aff'd. 317 U.S. 519; *Chiaravalloti v. U.S.*, 60 F. 2d 192 (C.C.A. 7, 1932); *Donegan v. U.S.*, 287 Fed. 641 (C.C.A. 2, 1922), cert. denied 260 U.S. 751. Further, as stated in *Carter v. State of Tennessee*, *supra* (18 F. 2d at p. 854):

" 'In such case, if it be assumed that one of the verdicts is erroneous, there is at least as much reason to consider the verdict of innocence incorrect as there is to consider the verdict of guilt improper.' "

Appellants assert that Adkisson's testimony "on its face" shows that "he and everyone else who went into the transaction, went into it in the highest of good faith . . ." (Br. 33). This self-serving testimony does not demonstrate the good faith of the appellants. As stated in *U.S. v. Morley*, 99 F. 2d 683, 685 (C.C.A. 7, 1938), cert. denied 306 U.S. 631:

" . . . Defendant has not necessarily established a case for a directed verdict in his favor by professing innocence and denying the existence of criminal intent. If the established facts and inescapable inferences are inconsistent with the accused's profession of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with quantum of proof necessary to convict, the guilt or innocence of the accused."

Finally, appellants assume that the overt act necessary

to complete the crime of conspiracy must itself be unlawful (Br. 34). This assumption is, of course, erroneous.⁴⁰

II

THE DENIAL OF APPELLANTS' MOTIONS TO QUASH THE INDICTMENT IS NOT REVIEWABLE; IN ANY EVENT, THERE WAS NO ERROR IN THE DISTRICT COURT'S RULING.

Appellants assign as error the lower court's denial of motions to quash the indictment (Br. 6; R. 48).⁴¹ Without any showing of insufficiency of the evidence presented to the grand jury, appellants contend that the indictment "must" have been based on hearsay testimony because, they allege, only a government investigator and an Assistant United States Attorney appeared before the grand jury to testify.⁴²

This assignment has no merit. In this circuit it has been uniformly held that "the denial of a motion to quash

⁴⁰ "Although to support a charge of conspiracy there must be proof of an overt act, it need not be in itself a criminal act." *Rose v. U.S.*, 149 F. 2d 755, 759 (C.C.A. 9, 1945); *Heskett v. U.S.*, 58 F. 2d 897 (C.C.A. 9, 1932), cert. denied 287 U.S. 643; *Bergen v. U.S.*, 145 F. 2d 181 (C.C.A. 8, 1944).

⁴¹ Appellants' brief seems to assume that all the appellants filed such a motion. In fact, Collins did not file a motion to quash. Fischgrund filed a motion (R. 44-6) while Schirm joined in defendant Gordon's motion to quash which made the same allegations as Fischgrund's motion (R. 39-41, 47).

⁴² Fischgrund's and Schirm's motions were based on an affidavit filed by Gordon's counsel in support of Gordon's motion (R. 41-3, 46). Affiant alleged "on information and belief" that no witnesses appeared before the grand jury to testify except Evans, an investigator for the Securities and Exchange Commission, and Lambeau, an Assistant United States Attorney, that their testimony was incompetent and hearsay, and that "said allegation on information and belief is based on the fact that it would be a physical impossibility to hear sufficient competent evidence to justify the allegations in the indictment."

an indictment is not reviewable." *Conway v. U.S.*, 142 F. 2d 202, 203 (C.C.A. 9, 1944) and *Tudor v. U.S.*, 142 F. 2d 206, 207 (C.C.A. 9, 1944) and cases cited therein. A similar rule has been adopted by other courts. *U.S. v. Hamilton*, 109 U.S. 63; *Colbeck v. U.S.*, 10 F. 2d 401, 402 (C.C.A. 7, 1925), cert. denied 270 U.S. 663 and 271 U.S. 662; *McGregor v. U.S.*, 134 Fed. 187, 192 (C.C.A. 4, 1904).

Even if this were not the rule in this circuit, the assignment would be without merit. Appellants base their allegations of what transpired before the grand jury merely upon information and belief. Not being present in the grand jury room, they have no way of knowing whether the evidence presented to the grand jury was competent or not. They cannot know whether any documentary evidence was submitted to the grand jury or whether the witnesses who appeared testified to any admissions made by the defendants.

Appellants offered no proof on this issue; their belief that the evidence "must" have been hearsay is of no significance. See *Radford v. U.S.*, 129 Fed. 49 (C.C.A. 2, 1904); *Cox v. Vaught*, 52 F. 2d 562, 563 (C.C.A. 10, 1931); *Kastel v. U.S.*, 23 F. 2d 156, 158 (C.C.A. 2, 1927), cert. denied 277 U.S. 604; *Murdick v. U.S.*, 15 F. 2d 965 (C.C.A. 8, 1926), cert. denied sub. nom. *Clarey v. U. S.*, 274 U.S. 752. "Surmise, suspicion, belief, these are not sufficient bases for negating the action of the Grand Jury, which is presumed to proceed according to law." *U.S. v. Krupnick*, 51 F. Supp. 982, 988 (D.C. N.J. 1943).

In the cases relied upon by appellants (Br. 7) there was an offer to prove that no evidence whatever or that no competent evidence of the offense charged was presented to the grand jury (*Brady v. U.S.*, 24 F. 2d 405 (C.C.A. 8, 1928); *Nanfito v. U.S.*, 20 F. 2d 376, 378 (C.C.A. 8, 1928)). That is clearly not the situation here. As the cases cited by appellants make clear, an indictment will not be quashed if there was any competent evidence before the grand jury to support it. *Murdick v. U.S.*, *supra* (15 F. 2d at p. 967); *An-*

derson v. U.S., 273 Fed. 20, 29 (C.C.A. 8, 1921), cert. denied 257 U. S. 647.⁴³

Appellants also contend that the district court abused its discretion in denying their alternative request for permission to examine the minutes of the grand jury in furtherance of their motions to quash (Br. 11). This contention likewise has no merit. Generally, the federal courts will not inspect or permit inspection of the minutes of a grand jury to determine whether the evidence is incompetent or insufficient, especially where, as in the instant case, the motion to quash merely alleges a conclusion that the evidence before the grand jury was hearsay and incompetent. *Cox v. Vaught*, 52 F. 2d 562, 564 (C.C.A. 10, 1931) ; *U.S. v. Goldman*, 28 F. 2d 424, 431 (D. Conn., 1928) ; *U. S. v. Herzig*, 26 F. 2d 487 (S.D. N.Y. 1928). As the court stated in *Murdick v. U.S.*, *supra* (15 F. 2d at p. 968), cited by appellants:

“ . . . if the court is of necessity compelled to review the evidence before the grand jury, weigh the same as to whether it is sufficient to warrant returning an indictment, sift the competent from the incompetent to determine its effect upon the minds of the jurors, then a new abuse of criminal practice will become prevalent in the courts absolutely subversive of criminal procedure.”

Nor were appellants, as they contend (Br. 12), deprived of their constitutional rights under the Fifth and Sixth Amendments to the Constitution. No showing was made that the indictment was illegally or wrongfully returned. Appellants' assignment relates only to the competency of the evidence introduced before the grand jury.

⁴³ Appellants, on authority of *U. S. v. Swift*, 186 Fed. 1002 (N.D. Ill. 1911), seem to assume that the Penal Code of California governs procedure in the federal district courts in California with respect to motions to quash (Br. 9). The *Swift* case does not so hold, but was merely referring to cases decided in state courts under state statutes. See also *McKinney v. U.S.*, 199 Fed. 25 (C.C.A. 8, 1912).

This raises no constitutional question. See *U.S. v. Swift*, 186 Fed. 1002, 1018-9 (N.D. Ill. 1911).

Finally, appellants cite the new Federal Rules of Criminal Procedure which authorize the district court to direct disclosure of the grand jury proceedings upon a showing that grounds may exist for a motion to dismiss the indictments because of matters occurring before the grand jury (Rule 6(e)). Apart from the fact that disclosure is made discretionary with the court upon cause shown, these rules did not become effective until March 21, 1946 (14 U.S. L.W. 2554, March 26, 1946), long after the termination of the trial and therefore, we submit, do not apply to the present case. See Rule 59.

III

APPELLANTS WERE NOT DENIED A "SPEEDY TRIAL"

Appellants assign as error the district court's denial of their motion to dismiss the indictment on the ground that they were denied the speedy trial guaranteed by the Sixth Amendment to the Constitution.⁴⁴ Appellants were indicted on February 4, 1942, on the basis of transactions occurring in 1938 and 1939, and the trial commenced on July 5, 1945. Their contention is essentially that they were "lulled into a point of inactivity" because on June 2, 1942, when they were ready for trial, an Assistant United States Attorney stated in open court that he had written for authority from the Attorney General to dismiss the case because he was convinced there was insufficient evidence to convict (Br. 13, 16).⁴⁵ Thereafter, the case was continued several times

⁴⁴ Appellants also assign as error the court's denial of their motions for an early trial. The record contains no such motions, nor is this assignment discussed in their brief (Cf. Br. 15).

⁴⁵ Although appellants ostensibly rely on the grounds set out in the motions to dismiss which appear in the record at pages 49-90, they apparently have abandoned the contention made in Fischgrund's affidavit that the S.E.C. attorneys knew

and finally was set for trial for July 5, 1944 (R. 53-4). Except for one continuance on the district court's own motion (Br. 13), the defendants at the several calendar calls of the case either requested adjournments on the ground that they were not ready to proceed to trial or consented to adjournments by the court for the purpose of fixing a trial date (R. 87). Appellants concede that they never demanded a trial (Br. 15).

This assignment is without merit. Apart from the fact that there was no undue delay, it is well settled in the federal courts that the provision in the Constitution for speedy trial is a personal right which is waived by the failure of the accused to demand trial. *Pietch v. U.S.*, 110 F. 2d 817 (C.C.A. 10, 1940), cert. denied 310 U.S. 648; *Daniels v. U.S.*, 17 F. 2d 339 (C.C.A. 9, 1927), cert. denied 274 U.S. 744; *Phillips v. U.S.*, 201 Fed. 259 (C.C.A. 8, 1912); *Worthington v. U.S.*, 1 F. 2d 154 (C.C.A. 7, 1924), cert. denied 266 U. S. 626; *Carter v. State of Tennessee*, 18 F. 2d 850 (C.C.A. 6, 1927); *O'Brien v. U.S.*, 25 F. 2d 90 (C.C.A. 7, 1928).⁴⁶

that the action would not be dismissed, but from "whim and caprice" refrained from so advising the court and defendants (R. 62). As pointed out in the affidavit filed by the Government in opposition to the motion to dismiss, only the Department of Justice can allow a request of the United States Attorney for leave to dismiss a criminal case (R. 85).

⁴⁶ In *Pietch v. U. S.*, *supra*, in circumstances similar to those in the present case, it was presumably argued that the communicated intention of the United States Attorney to obtain dismissal of the prosecution, excused appellant's failure to demand trial. No objection or protest to the court was made respecting the delay. A motion to dismiss the indictment on account of the delay was filed, but it was filed more than three years after the return of the indictment, and, as in the present case, it was a motion to dismiss—not a demand for trial. The court, holding that appellant's right under the Constitution to a speedy trial was not denied, said (110 F. 2d at p. 819):

"A person charged with a crime cannot assert with success that his rights to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States has been invaded unless he asked for a trial. In the absence of an affirma-

THE CONSPIRACY COUNT SUFFICIENTLY CHARGED AN INTENT TO USE THE MAILS AND THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CHARGE.

Appellants assign as error the district court's denial of motions for arrest of judgment and to vacate the judgments of conviction notwithstanding the verdicts, on the grounds that the conspiracy count of the indictment does not specifically allege an intent to use the mails, and that the evidence does not show such an intent (Br. 35, 38).

This assignment has no merit. The conspiracy count sufficiently charges an intent to use the mails as well as other instrumentalities in interstate commerce in carrying out the scheme to defraud.⁴⁷ Defendants are charged in count 11 with conspiring with Siens, Barclay, Adkisson and Davis wilfully to violate Section 17(a) (1) of the Securities Act and the mail fraud statute,

“and among such violations to commit the divers offenses charged against the said defendants in the First to

tive request or demand for trial made to the court it must be presumed that appellant acquiesced in the delay and therefore cannot complain.”

The only federal case cited by appellant to support their assignment of error (*U. S. v. Henning*, 15 F. 2d 760 (C.C.A. 9, 1926)) is irrelevant. It merely holds that a defendant serving a prison sentence for a different offense is entitled to a speedy trial like everyone else. Indeed, he demanded trial, and eventually petitioned for mandamus to compel the court to order an immediate trial.

⁴⁷ It is of course well settled that in order to sustain a charge of conspiracy to violate the mail fraud statute, it is essential to prove an intent not only to defraud, but also to defraud by the use of the mails. *Oliver v. U. S.*, 121 F. 2d 245, 250 (C.C.A. 10, 1941), cert. denied 314 U.S. 66; *Morris v. U. S.*, 7 F. 2d 785 (C.C.A. 8, 1925), cert. denied 270 U.S. 640; *Farmer v. U. S.*, 223 Fed. 903 (C.C.A. 2, 1915), cert. denied 238 U.S. 638. The same rule would apply with respect to the use of the mails or interstate instrumentalities under Section 17(a) (1) of the Securities Act.

Tenth Counts, inclusive, of this indictment, the allegations of which Counts, descriptive of the said defendants in the sale of the common stock of Union Associated Mines Company *by the use of the United States mails*, employing a scheme and artifice to defraud, and of the connections of said defendants therewith, and descriptive of the *defendants' use of the United States mails in furtherance of the said scheme as they had devised it*, are hereby incorporated by reference to said First to Tenth Counts, inclusive . . .” (R. 33-4). (Italics supplied.)

We submit that the above-quoted portion of the indictment constitutes an explicit allegation of a purpose to make use of the federal facilities. Moreover, an explicit allegation was not required since it is settled law that a charge of conspiracy to commit violations of these statutes in itself constitutes a sufficient allegation of an intent to use the mails or interstate instrumentalities in carrying out the scheme to defraud. *Oliver v. U.S.*, *supra*; *U.S. v. Womack*, 98 F. 2d 742, 744 (C.C.A. 7, 1938) ; *U.S. v. Shurtleff*, 43 F. 2d 944, 948 (C.C.A. 2, 1930) ; *Chew v. U.S.*, 9 F. 2d 348, 352 (C.C.A. 8, 1925) ; *Morris v. U.S.*, *supra*; and see *Rose v. U.S.*, 149 F. 2d 755, 758 (C.C.A. 9, 1945). As stated in *Morris v. U.S.*, *supra* (7 F. 2d at p. 790) :

“The nineteenth count of the indictment does not seem to contain a specific and clear allegation of intent, but it does charge an agreement to do the things which would be a violation of section 215 of the Criminal Code, and said section could not be violated without the use of the mails. The charge of an agreement to violate section 215 is a charge of an intention to use the mails in carrying out the scheme to defraud. *Frohwerk v. United States*, 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561. The indictment very clearly shows that the conspiracy alleged contemplated the use of the United States mails to a very great extent.”

With respect to the contention that an intent to use the mails was not proved, we submit that the evidence in the case amply justified the jury in finding that the con-

spiracy shown by the evidence included an agreement to use the mails and interstate instrumentalities in carrying out the scheme to defraud in the sale of Union stock. The record is replete with evidence that it was a part of the conspiracy to use the mails and interstate commerce and that such were in fact used in connection with the conspiracy, both between the conspirators themselves and the conspirators and purchasers of Union stock. Each of the first ten counts of the indictment and most of the overt acts listed in count 11 recite uses of the mails. In the statement of facts we cite the great number of letters and telegrams sent by the conspirators and the frequent interstate trips made in furtherance of the scheme.

From the nature of the plan, it is clear that the mails and facilities of interstate commerce would have to be used to effectuate it. Plymouth and the Torrance oil field were in Los Angeles, California, while Union was in Salt Lake City, Utah. Some of the defendants and conspirators operated in Los Angeles while others functioned in Salt Lake City. Since it was contemplated that control of Union be acquired by the conspirators and that Union transfer large blocks of its stock to Plymouth, frequent intercourse between the two companies and the conspirators was not only foreseeable but essential in carrying out the scheme. Also, the market manipulation contemplated the use of the mails and the facilities of interstate commerce, including the stock exchange. For the conspirators to keep in touch with each other, it is inferable that they would travel between California and Utah as well as use the mails. In addition, the mails would obviously have to be used in selling securities.

It is well settled that an intent to use the mails may be shown by circumstantial evidence. *Blue v. U.S.*, 138 F. 2d 351 (C.C.A. 5, 1943), cert. denied 322 U.S. 736, 737, 771; *Oliver v. U.S.*, 121 F. 2d 245, 250 (C.C.A. 10, 1941), cert. denied 314 U.S. 66; *U.S. v. Rowe*, 56 F. 2d 747, 750 (C.C.A. 2, 1932), cert. denied 286 U.S. 554; *Burns v. U.S.*, 279 Fed. 982, 986 (C.C.A. 2, 1922); *Preeman v. U.S.*, 244

Fed. 1, 18 (C.C.A. 7, 1917), cert. denied 245 U.S. 654; *Farmer v. U.S.*, 223 Fed. 902, 907 (C.C.A. 2, 1915), cert. denied 238 U.S. 638. As stated in *Blue v. U.S.*, *supra* (138 F. 2d at p. 361) :

“With regard to the intent to use the mails, it is the rule that where the accomplishment of the conspiracy contemplated the use of the mails, and such use for the execution of a scheme was essential, intent on the part of the conspirators to use the mails may be inferred (*Oliver v. United States*, 10 Cir., 121 F. 2d 245) ; and if in the carrying out of the conspiracy, the use of the mails is indispensable, the intent to use the mails as part of the conspiracy is thereby sufficiently shown, and all who participate in the scheme would be guilty of conspiracy to use the mails to defraud, although they might not themselves make use of the mails. *Preeman v. United States*, *supra*. It is enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails. *Spivey v. United States*, 5 Cir., 109 F. 2d 181.”

V

THERE WAS NO ERROR IN THE RECEIPT OF EVIDENCE

A. *The Minutes of Union* (GX 6).

Appellants do not object to the authenticity of this exhibit, but contend that it was hearsay with respect to all the defendants except Morgan, who was an officer and director of Union (Br. 46). There is no merit in this contention. The minutes of a meeting of a corporate board of directors are not hearsay at all. As stated in *Wigmore, Evidence* (3d ed. 1940), Vol. IV, § 1074:

“The record [of a meeting] is not somebody’s hearsay testimony to the act; it is the act itself.”⁴⁸

However, even if this exhibit is regarded as hearsay with respect to Morgan’s co-defendants, it was properly re-

⁴⁸ Citing *Owings v. Speed*, 5 Wheat. 420, 422 (1820) ; *Sigua Iron Co. v. Brown*, 171 N.Y. 488, 64 N.E. 194 (1902) ; *People v. Burgess*, 244 N.Y. 472, 155 N.E. 745 (1927).

ceived in evidence as an exception to the hearsay rule. The law is well settled that if a conspiracy is shown, declarations and acts of one conspirator in furtherance of the business of the conspirators are admissible against the co-conspirators. See *Cornes v. U.S.*, 119 F. 2d 127 (C.C.A. 9, 1941), which also involved corporate minutes. Also see *U.S. v. Von Clemm*, 136 F. 2d 968, 971 (C.C.A. 2, 1943), cert. denied 320 U.S. 769.

Nor does the acquittal of Morgan affect the admissibility of these minutes. Obviously, the district court could not foresee that Morgan would be acquitted. In *Kamano-suke Yuge v. U.S.*, 127 F. 2d 683, 688-9 (C.C.A. 9, 1942), cert. denied sub nom. *Mateus v. U.S.*, 317 U.S. 48, this court stated:

“ . . . where there is evidence to connect one co-defendant with a conspiracy, the fact that the jury fails to convict him of the conspiracy charged does not in and of itself render testimony of that person's acts and declarations inadmissible as against other alleged co-conspirators.”

In any event, if this exhibit should be deemed inadmissible against Morgan's co-defendants, the error in receiving it did not prejudice appellants. Substantially the same matters covered by the minutes—the Union-Plymouth transactions—appeared in other admissible evidence (E. g. R. 145-6, 230, 244), and therefore the exhibit was merely cumulative. *Butler v. U.S.*, 138 F. 2d 977, 980 (C.C.A. 7, 1943).

B. *Testimony of Harold V. Dodd as to Oil Production in Devil's Den Area.*

Defendant Gordon leased to Union through Millener a 40-acre tract of land in the Devil's Den area. Dodd a deputy state oil and gas supervisor and petroleum engineer of the State of California (R. 328), gave testimony, based on official records, that the total production from the 20 wells which produced oil in this area (covering roughly 10,000

acres) in 1938, was 9,094 barrels. At the trial, defendants objected to this testimony on the ground of immateriality (Br. 47-8). They now argue that it is also incompetent as hearsay (Br. 49). This testimony we submit was clearly material to the charge in the indictment that the defendants, as part of their scheme to defraud, leased and assigned "unproven and undeveloped properties claimed by defendants to be of value to" Union and secured "for themselves from said corporation 235,000 shares of the stock of said corporation" (R. 5-6). Moreover, this testimony was also admissible as an exception to the hearsay rule, since Dodd testified in his capacity as a state official from an examination of production records required to be filed by persons drilling wells in the State of California (R. 328). *Wigmore, Evidence* (3d ed. 1940) Vol. I, §665.

C. Testimony of Paul Julian Howard as to Assessed Value of Devil's Den Tract.

This witness, who was the chief appraisal engineer of Kern County, and also served as assistant county assessor, testified that the official assessment in 1938 and 1939 of the oil and mineral rights in the tract in question was that they had no value (R. 345). Appellants contend that this testimony is immaterial (Br. 50-2). We submit that this testimony was clearly material to the question whether defendants leased to Union unproven and undeveloped land. Counsel for Collins and Fischgrund conceded that proven land would "probably" have a higher assessed value (R. 345).

D. Testimony of Charles H. Shomate as to Title of Devil's Den Tract.

This witness, the county recorder of Kern County, testified from an examination of the county records that on the date when Gordon and others leased the Devil's Den tract to Millener, one Blynn was the registered owner of the property (R. 349). His testimony was clearly relevant on the question whether Union, in taking an assignment of this lease, received valuable consideration for its surrender of

235,000 shares of stock to Plymouth, and is evidence also of the value of stock which is based on such dubious title. The district court properly recognized that the lack of registration in Gordon's name was evidence, though not conclusive evidence, of his lack of ownership (R. 348). Appellants' objection to this testimony as hearsay with respect to all the defendants except Gordon (Br. 68), is invalid for reasons discussed in Point V, A, *supra*, pp. 43-4. Accordingly, there was no error in refusing to strike this testimony.

However, if it were error, it was harmless. Defendants introduced testimony, which was not controverted, showing that Gordon had at least equitable title to the property and that Blynn held legal title as a straw party (R. 505-6).

E. Testimony of Investor Witnesses Concerning Acts and Declarations of Murphy and McEvoy (see Br. 53-4, 55-61, 62-5, 67-8, 70-5) and Exhibits Pertaining to Their Transactions (GX 27, 28, 29, 50, 52).

There is evidence in the record from which the jury could properly conclude that Murphy and McEvoy, though not specifically named in the indictment as defendants or co-conspirators, were among the "other persons, whose names are to the Grand Jurors unknown," who were included in the conspiracy charge in the indictment. The evidence shows that Murphy "was an even partner with Collins" in the graduated price scale option contract (R. 310) and that McEvoy occupied an office with Collins and Siens in the Plymouth office suite for the purpose of selling Union stock, and that he sold Union stock as a partner or in behalf of Collins under the latter's contract (R. 293-4, 296, 313, 550, 552-3). As noted above, once a conspiracy is established, the acts and declarations of one conspirator are admissible in evidence against his co-conspirators. Consequently, checks given to McEvoy for Union stock (GX 27, 28) and certain of the Union stock certificates issued to a customer of McEvoy (GX 29; R. 492), were properly admitted.

The check for Union stock (GX 50) which Tucker gave to a securities broker selected by Murphy (R. 493-4), and

the confirmation of the purchase (GX 52; R. 411), although relating to stock not covered by the Collins contract, were properly admitted. Collins' participation in the scheme under his contract with Plymouth involved not only the sale of Union stock but also the manipulation of the market so as to make such sales profitable. Murphy, as Collins' associate, was at this point evidently furthering the manipulative purpose; Tucker's purchase of the stock through an outside broker would contribute to raising the market price of the stock. Consequently, Murphy's acts in this connection and the exhibits pertaining thereto were admissible against Collins and the other conspirators.

Even assuming Murphy and McEvoy were not involved in this conspiracy, the testimony of these investor witnesses and the exhibits in question were properly admitted. There was evidence, as we have shown, from which the jury could conclude that Collins directed the course of conduct which embraced these acts and declarations. Murphy and McEvoy were at least agents of Collins and it is settled law that acts and declarations of an agent authorized and directed by the principal are admissible against the latter. *U. S. v. S. B. Penick & Co.*, 136 F. 2d 413, 415-6 (C.C.A. 2, 1943).

F. Testimony of Frank L. Tucker as to his Disposition of Union Stock Purchased by him.

Tucker testified that he no longer held the Union stock which he purchased, having surrendered it to Plymouth and received a note therefor (R. 412). Appellants object to the materiality of this testimony because it relates to an event occurring after the date of the scheme laid in the indictment (Br. 54, 62). We submit that this testimony was properly admitted as showing the relationship between Union, Plymouth and the conspirators. In *Harper v. U.S.*, 143 F. 2d 795, 803 (C.C.A. 8, 1944), where a similar contention was made, the court stated:

"In admitting testimony of attending circumstances, especially in cases involving allegations of

fraud, much is left to the discretion of the trial court . . . Evidence outside of the scheme charged may be admitted which tends to elucidate or clarify false statements for the purpose of showing intent.”

See also *Metzler v. U.S.*, 64 F. 2d 203, 207 (C.C.A. 9, 1933).

Nor is there any validity to appellants' objection that this testimony is hearsay (Br. 62). Tucker was describing his own acts and experience.

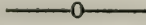
G. *Duplicate of Log of Oil or Gas Well (GX 41)*.

Appellants contend that the district court erred in refusing to strike this exhibit from the record on the ground that no proper foundation was laid and because the exhibit narrates past events (Br. 66-7). This contention has no merit. This exhibit consists of two reports in duplicate of the oil production from wells Nos. 1 and 2, respectively, in the Torrance field. Such reports, under California law, must be filed with the State Division of Oil and Gas. They are dated September 26, 1939, and June 20, 1939, and describe for each well the initial production on, and the production 30 days after, December 14, 1938, and February 28, 1939, respectively. They were obtained from the Plymouth office.⁴⁹ We submit that no foundation was necessary since these reports were prepared by Plymouth in the regular course of business and pursuant to state law. 28 U.S.C.A. 695. In any event, any error in admitting them was cured and moreover did not prejudice appellants. Co-conspirator Davis testified he was in charge of Plymouth's records, and that he prepared and filed these reports (of which GX 41 is a duplicate) with the State Division of Oil and Gas (R. 553, 554, 557). Furthermore, his testimony indicates that the duplicate reports were correct copies of the reports which

⁴⁹ See *Wigmore, Evidence* (3d ed. 1940), Vol. VII, § 2160, citing *Wikman's Estate*, 148 Cal. 642, 84 Pac. 212 (1906), to the effect that the presence of documents in a natural place is sufficient evidence of authenticity.

were filed (R. 557-8). He also confirmed the statement in the reports that the initial production from well No. 1 was 124 barrels (R. 557).

The statements in these reports constitute admissions and acts in furtherance of the conspiracy by those of the conspirators who controlled Plymouth. Therefore, the exhibit was properly admitted as an exception to the hearsay rule.



In this case, involving many complicated transactions, it may be that a few items of evidence were admitted which perhaps might have been excluded. In the course of a hotly contested trial, it is not surprising that appellants are able to comb the record and pick out a few insubstantial items which might not be clearly admissible. Defendants made many objections, often on vague and general grounds, thus placing upon the trial court an unnecessarily heavy burden in deciding admissibility. However, assuming without admitting that some of the court's rulings may have been incorrect, we do not believe that appellants were prejudiced by any of the rulings made. See *U. S. v. Trenton Potteries Co.*, 273 U. S. 392, 404, where the Supreme Court stated:

“The alleged errors in receiving and excluding evidence were rightly described by the court below as minor points. The trial lasted four and one-half weeks. A great mass of evidence was taken and a wide range of inquiry covered. In such a case a new trial is not lightly to be ordered on grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance.”

See also *Simons v. U. S.*, 119 F. 2d 539, 559 (C.C.A. 9, 1941), cert. denied 314 U. S. 616.

The jury returned its verdicts upon instructions which were eminently fair to the defendants. No error was assigned to the charge. Indeed, counsel for appellants Collins and Fischgrund expressed satisfaction with the charge (Tr. 1696).

CONCLUSION

Appellants had a fair trial. The evidence was clearly sufficient to sustain the charge of conspiracy. We believe that we have established that the trial court's rulings were correct. If any error occurred, appellants were not prejudiced thereby. The convictions should be affirmed.

Respectfully submitted,

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May 1946.

No. 11037

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

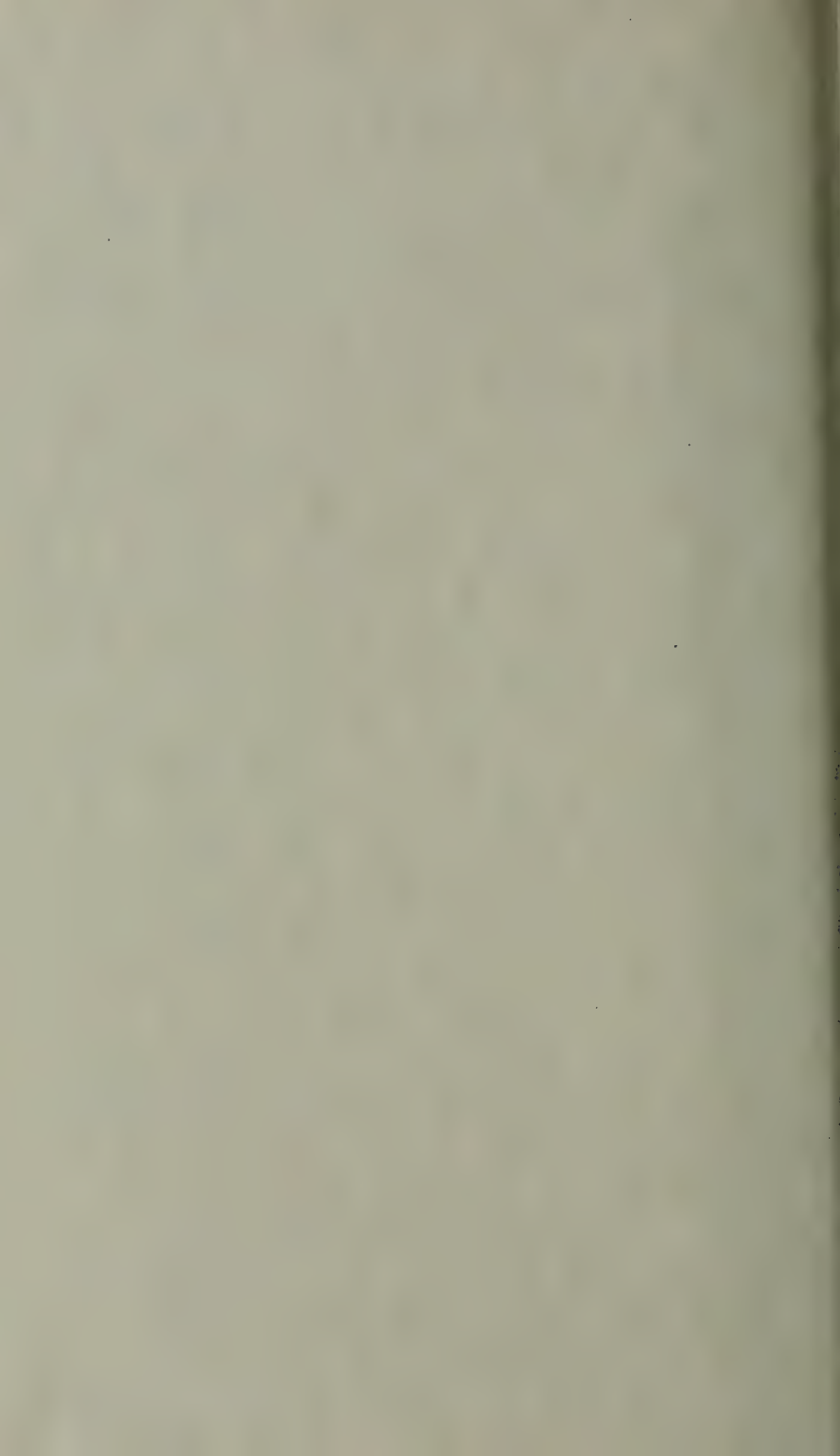
Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

PETITION FOR REHEARING AND ARGUMENT
IN SUPPORT THEREOF.

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FILED



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PETITION FOR REHEARING.

Come now the appellants, James H. Collins, Sidney Fischgrund and Christopher E. Schirm, after decision by this Honorable Court affirming the judgment of the District Court of the United States for the Southern District of California, Central Division, and respectfully petition this Honorable Court for a rehearing upon each and all of the following grounds, to-wit:

I.

This Honorable Court's Opinion Is Based on a Misconception and Misunderstanding of the Facts as Revealed by the Opinion Itself.

(a) The following statements of fact are not borne out by the evidence, and are in direct contradiction of the facts as they actually are:

1. The opinion states, "The participants in the scheme acquired control of Union." The statement is not borne out by the evidence. The participants in the scheme never acquired control, and further attempted to exercise control of Union. [Tr. of Rec. 138-139.]

2. The opinion further states that the stock of Union was "again listed." The statement is not borne out by the evidence. The stock of Union Associated Mines Company was *not again listed*.

3. The opinion further states that the appellants "caused the Plymouth to be organized and they owned and controlled the few issued shares." The statement is not borne out by the evidence. The only convicted defendant who owned stock in Plymouth Oil Company, or any interest in Plymouth Oil Company, was Sidney Fischgrund. Neither of the other convicted defendants had any interest of any kind in Plymouth Oil Company.

4. The statement that Plymouth exchanged certain interests in oil wells to Union Associated Mines Company, to lend a fictitious appearance of worth to the stock of Union Associated Mines Company, is against the evidence, and is not true. [Tr. of Rec. 516.] John H. Wentz, an outstanding petroleum engineer, as is evidenced by his biography [Tr. of Rec. 515], testified that a fifty per cent interest would be worth \$60,000.00.

5. The inferences relating to the statement in the opinion, "These dealings could hardly have had any purpose other than to lend a fictitious appearance of worth to the stock of Union * * * with the thought ultimately of unloading it on the public at substantial gains to those engineering the plan," are inferences which are nowhere supported by the evidence; and the law is elemental that

where two inferences can be deducted from a state of facts, one tending to establish fraud and the other not tending to establish fraud, that the inference of clean dealing must prevail. There can be no presumption of guilt by reason of an unusual transaction.

6. The opinion goes on to state: "In the process of the manipulation, progressively higher bids for the stock were made—bids bearing no relation to the merits of the investment." The statement is not borne out by the evidence [Tr. of Rec. 170], wherein A. P. Adkisson testified that his first bid for the stock was 1¢. There was none offered at that price. His next bid was 1½¢, at which time he acquired 10,000 shares (a gross of \$150.00). His next bid was 2¢, *"but so far as I know, we never acquired any other stock, other than the 10,000 shares at 1½¢."* If this is rigging the market and causing relatively higher bids for the purpose of defrauding anyone, it is an entirely new theory, which in common sense and logic cannot possibly be used as a precedent.

7. The opinion goes on to state: "The sole object of placing them (the so-called progressive bids) was to induce a rise in the price of the Union stock." The statement is not borne out by the evidence, because the stock never went any higher than, as far as can be ascertained, one isolated transaction at 5¢ per share, with which these appellants were in no way concerned. Union Associated Mines Company stock having an actual worth of approximately 10¢, was certainly not sold with any fraudulent intent if sold at a price of 3¢ per share.

8. The opinion goes on to state: "Other methods characteristic of manipulative schemes were employed, including the payment of a dividend by Union." That statement is untrue because the dividend was paid long

after stock-selling ceased, was not paid for any purpose of selling any stock, and there is not one word of evidence to that effect in the transcript. It is an assumption like all of the other statements complained of herein, which is not borne out by the evidence.

9. The opinion goes on to say: "Enough to say, without further analysis of the evidence, that the conspiracy charged was substantially proven." The facts as written by the Court being based on false premises and a misconception of the testimony and evidence, the conclusions stated cannot be substantiated.

II.

The Circuit Court Erred in Stating the Conclusion That Claimed Errors in the Evidence Were of Insufficient Merit to Warrant Discussion.

(a) Appellants' point No. 1 raised the question as to whether or not the appellants were deprived of constitutional rights given them by Amendment Five of the Constitution and Amendment Six of the Constitution, and said point particularly referred to the right of the appellants to examine into the proceedings held by the Grand Jury in reference to the return of the indictment, and said point is of sufficient merit to warrant discussion.

(b) Appellants' point No. 4 raises the direct question as to the sufficiency of the Conspiracy Count in the indictment and the error of the Court in denying motions for arrests of judgment and to vacate judgments of conviction notwithstanding the verdicts. The authorities cited in support of said point are, in the opinion of appellants, conclusive as to the merit of the point, and therefore the questions of law raised are of sufficient merit to warrant discussion.

(c) Appellants' point No. 5 claims error in admitting into evidence the Minute Books of the Union Associated Mines Company. These Minute Books were neither seen nor prepared by any of the appellants. The objection of hearsay is good. If the objection is good, it is of sufficient merit to warrant discussion.

(d) Appellants' point No. 6 claims error in admitting into evidence the testimony of Harold V. Dodd as to oil production in the district known as "Devil's Den" in California. There was no foundation laid for the admission of that testimony. There was no contention made that any of the appellants had ever claimed production. The testimony was hearsay and prejudicial, and is of sufficient merit to warrant discussion.

(e) Appellants' point No. 7 claims error in admitting into evidence testimony as to the assessed value of unproven oil land, which evidence was admitted for the purpose of establishing value. The ruling of the Court was unquestionably error as determined by a long line of cases, and certainly is of sufficient merit to warrant discussion.

(f) Appellants' point No. 8 claims error in the admission in evidence of testimony of the defendant Frank L. Tucker and of the witness Frank Veloz. The examination of the record discloses that the evidence is, on its face, inadmissible, by reason of the fact that there was no connection of any kind shown between the testimony of the witnesses and any of the defendants; and the record is also clear that any conversations the witnesses had, were with other than the appellants. The point is of sufficient merit to warrant discussion.

(h) Appellants' point No. 9 claims there was error in denying motion to strike certain documentary evidence in oral testimony. The errors are *prima facie* and consist of motions to strike written evidence admitted without proper foundations, oral evidence that is hearsay, and all of the objections were well taken. The matters are of sufficient merit to warrant discussion.

Wherefore, appellants above named pray this Honorable Court to grant a rehearing.

Dated: October 24th, 1936.

DAVID H. CANNON,

Attorney for Appellants James H. Collins and Sidney Fischgrund.

BEN L. BLUE,

Attorney for Appellants Sidney Fischgrund and Christopher Schirm.

Certificate of Good Faith.

We, David H. Cannon, attorney for the appellants James H. Collins and Sidney Fischgrund, and Ben L. Blue, attorney for appellants Sidney Fischgrund and Christopher Schirm, do hereby certify that the above and foregoing Petition for Rehearing is well founded in our judgment and is not interposed for delay.

Dated October 24, 1946.

DAVID H. CANNON.

BEN L. BLUE.

No. 11037

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

I.

We do not intend to reiterate the arguments presented in the appeal, in support of this petition for rehearing. The opinion shows clearly, however, that the true facts involved in the cause were misstated. We state to the Court as officers of the Court, and with the great respect that we have for the Court, that when an appeal is determined upon a misconception of facts, there is no determination of the points raised; that unless the facts are truly and correctly stated, the determination of the law, based as it is on a wrongful premise, does not apply.

In our petition for rehearing we point out nine misstatements of fact in one paragraph. This is, to put it

mildly, extraordinary, and can be likened to the old story of Smith saying to Brown that he had heard that Jones of San Francisco had made \$40,000 during the current year. Brown told Smith that he was wrong in four points—in the first place the man's name was not Jones, but Jonas; in the second place it was not San Francisco, it was Los Angeles; in the third place it was not \$40,000, it was \$4,000; and in the last place he did not make it, he lost it.

II.

In addition to the unmistakable error in misstating the facts, the Court in its opinion waves aside the errors complained of by the trial court with the simple statement that "they do not warrant discussion." The record of this case shows that the trial Judge, after listening to five weeks of evidence, and after the jury had come in with a verdict of guilty, imposed upon these appellants no punishment at all, not even a fine or probation. There must have been a reason for it, and the reason is obvious. There was nothing that was disclosed by the evidence that these appellants did anything knowingly wrongful.

We, as counsel for the appellants, say, and not because we are counsel for the appellants, that we do not know today what these men did that was wrong. The facts are, and we only repeat this because we feel it is pertinent, that the two main defendants were acquitted, and these three minor defendants were convicted, and certainly on a state of facts such as this any errors in the admission of evidence, or the exclusion of evidence, is sufficiently important to warrant discussion, because any of the evidence that was wrongfully admitted may have swerved this jury as it did and may have caused a prejudice that

existed and brought about the verdict. Every safeguard certainly should be given to a man charged with crime in the trial of the case, particularly in a case of this sort.

To show the obviousness of the importance of wrongfully admitted evidence and its possible effect on a juror's mind, let us take one point which, in the opinion of the Court, did not warrant discussion, and that is point No. 7, admitting in evidence the testimony of a County Assessor as to the assessed value of the land for the purpose of determining the value of the land. We herewith cite a few cases stating that such evidence is inadmissible:

- San Jose & A. R. Co. v. Mayne*, 83 Cal. 566;
Bartlesville Interurban Ry. Co. v. Quaid, 151 Pac. 891 (Okla.), L. R. A. 1918A, 653;
Denver R. Co. v. Heckman, 45 Colo. 470;
Oldenberg v. Oregon Sugar Co., 39 Ore. 564;
Lewis v. Englewood Elev. etc. Co., 223 Ill. 223;
Shea v. Boston etc. R. Co., 217 Mass. 163;
Calahan v. Dunker, 51 Ind. App. 436;
Kelly v. People's Nat. Ins. Co., 262 Ill. 158;
Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279;
Carper v. Risdon, 19 Colo. App. 530 (conversion);
Starrs v. Robinson, 74 Conn. 443;
Anthony v. New York etc. Co., 162 Mass. 60;
American State Bk. v. Butts, 111 Wash. 612;
Putnam v. White, 88 So. 355 (Ala.);
Con. v. Tryon, 31 Pa. Super. Ct. 146;
Ridley v. Seaboard etc. R. Co., 124 N. C. 37;
Girard Tr. Co. v. Philadelphia, 248 Pa. 179;

In re Northlake Ave., 96 Wash. 344;
Dudley v. Minn. etc. Co., 77 Ia. 408;
McNulty v. Lawley, 42 Cal. App. 747;
Yolo W. & P. Co. v. Edmonds, 50 Cal. App. 444.

Conclusion.

We earnestly feel that the appellants have failed to make clear to the Court some of the very vital points in this case, or that because of the voluminous record and briefs, this Court has fallen into error on its concept of the facts, and of the law applicable thereto.

We feel that further oral argument before the Court would be helpful; the principles of law involved are of such importance not only to these appellants but to all persons who may be brought before the Court on similar charges and to the Bar generally, that a rehearing ought to be granted as respectfully suggested.

Dated: October 24th, 1946.

DAVID H. CANNON,

Attorney for Appellants James H. Collins and Sidney Fischgrund.

BEN L. BLUE,

Attorney for Appellants Sidney Fischgrund and Christopher Schirm.

